TRANSCRIPT

OF

RECORD

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 69.

FRANCIS WINSLOW, AUGUSTUS JAY, AND AMERICAN SECURITY AND TRUST COMPANY, TRUSTEES, AND KATE LA MONTAGNE, HARRIET WINSLOW, AND ELIZABETH P. PATTERSON, PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(20,298.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 333.

FRANCIS WINSLOW, AUGUSTUS JAY, AND AMERICAN SECURITY AND TRUST COMPANY, TRUSTEES, AND KATE LA MONTAGNE, HARRIET WINSLOW, AND ELIZABETH P. PATTERSON, PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page.
Caption	1
Transcript from the supreme court of the District of Columbia	1
Caption	1
Instrument of appropriation	2
Exhibit B—Plat of Patterson estate	5
Citation to owners	5
Answer of Francis Winslow *et al.*	6
Exhibit A—Plat of Patterson tract and vicinity	9
Amendment to answer	9
Exhibit B—Plat of Patterson tract showing proposed streets	10
Appointment of appraisers	11
Instructions to appraisers	11
Report of appraisers	13
Testimony for petitioner	15
Testimony of William B. Turpin	15
E. J. Stellwagen	25
Harold E. Doyle	27
Charles H. Spencer	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 7, 1906.

	Page.
Exhibit No. 1—Profile, Brentwood road	36
No. 2—Plat, Patterson tract and vicinity	36
Testimony of Charles H. Spencer (recalled)	36
Testimony for respondents	39
Testimony of Jesse H. Heiskell	39
John B. Daish	46
Bill of exceptions	54
Exceptions to award and appraisement	55
Withdrawal of exceptions by petitioner	56
Withdrawal of objections by respondents	56
Confirmation of award	57
Payment to respondents ordered	57
Appeal	58
Deposit in lieu of appeal bond allowed	58
Memorandum: Deposit made in lieu of bond	58
Directions for preparation of transcript	59
Clerk's certificate	59
Motion to dismiss appeal	61
Order submitting motion	62
Order postponing motion to dismiss until hearing of case on merits	62
Minute entries of argument	63
Memorandum: Decree of dismissal vacated	63
Opinion of March 6, 1906, withdrawn	63
Petition for rehearing	63
Order submitting petition for rehearing	64
Opinion	65
Judgment	78
Order allowing writ of error and appeal	79
Writ of error	79
Bond on writ of error	80
Citation and service	81
Clerk's certificate	82

In the Court of Appeals of the District of Columbia

FRANCIS WINSLOW ET AL., Appellants,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.
No. 1570.

a Supreme Court of the District of Columbia.

In the Matter of the Condemnation by THE BALTIMORE AND OHIO RAILROAD COMPANY of part of a tract of land located in the county of Washington, District of Columbia, and formerly known as "Youngsborough," described as follows: Beginning at the northeast corner of Florida avenue and Brentwood road, thence in a northeasterly direction along the easterly side of said Brentwood road 93 feet, more or less, to an angle in the easterly line of said road; thence northeasterly along said east line to a point 80 feet distant, measured on a radial line from the centre line between the Pennsylvania and Baltimore and Ohio main tracks, as they will be constructed across said Brentwood road, said centre line being the 3 degree curve shown in red on blue print hereto attached; thence southerly on a line parallel and 80 feet distant from the said above mentioned centre line, a distance of 244 feet, more or less, to the north line of said Florida avenue; thence in a northwesterly direction along the northerly line of said Florida avenue, a distance of 103 feet, more or less, to place of beginning. The above described tract to be used for right of way purposes. Also a strip of ground 50 feet wide east of and immediately adjoining the parcel above described, and extending from the easterly line of said Brentwood road to the northerly line of Florida avenue. The last mentioned parcel to be used for relocating and changing of said Brentwood road. District court, No. 626.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Instrument of Appropriation.*

Filed August 22, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In the Matter of the Condemnation by THE BALTIMORE AND OHIO RAILROAD COMPANY of part of a tract of land located in the county of Washington, District of Columbia, and formerly known as "Youngsborough," described as follows: Beginning at the northeast corner of Florida avenue and Brentwood road, thence in a northeasterly direction along the easterly side of said Brentwood road 93 feet, more or less, to an angle in the easterly line of said road; thence northeasterly along said east line to a point 80 feet distant, measured on a radial line from the centre line between the Pennsylvania and Baltimore and Ohio main tracks, as they will be constructed across said Brentwood road, said centre line being the 3 degree curve shown in red on blue print hereto attached; thence southerly on a line parallel and 80 feet distant from the said above mentioned centre line, a distance of 244 feet, more or less, to the north line of said Florida avenue; thence in a northwesterly direction along the northerly line of said Florida avenue, a distance of 103 feet, more or less, to place of beginning. The above described tract to be used for right of way purposes. Also a strip of ground 50 feet wide east of and immediately adjoining the parcel above described, and extending from the easterly line of said Brentwood road to the northerly line of Florida avenue. The last mentioned parcel to be used for relocating and changing of said Brentwood road. District docket, No. 626.

The Baltimore and Ohio Railroad Company, a body corporate, duly incorporated under act of assembly of Maryland of February 28, 1827, and authorized by act of Congress of March 2, 1831, and by subsequent acts to extend, construct and use its lines within the District of Columbia and the city of Washington, being de-
2 sirous of acquiring in fee simple, in accordance with the provisions of the act of Congress approved February 28, 1903, and the other acts of Congress therein referred to, for the purposes of providing facilities for passengers and freight traffic, right-of-way and approaches to freight and passenger terminals, the part of the tract of land located in the county of Washington, District of Columbia, and formerly known as "Youngsborough," described as follows: Beginning at the northeast corner of Florida avenue and Brentwood road, thence in a northeasterly direction along the easterly side of said Brentwood road, ninety-three (93) feet, more or less to an angle in the easterly line of said road; thence northeasterly along said east line to a point eighty (80) feet distant measured

on a radial line from the centre line between the Pennsylvania and Baltimore and Ohio main tracks, as they will be constructed across said Brentwood road, said centre line being the three (3) degree curve shown in red on blue print hereto attached; thence southerly on a line parallel and eighty (80) feet distant from the said above mentioned centre line, a distance of two hundred and forty-four (244) feet, more or less, to the north line of said Florida avenue; thence in a northwesterly direction along the northerly line of said Florida avenue a distance of one hundred and three (103) feet, more or less, to place of beginning. The above described tract to be used for right of way purposes.

Also a strip of ground fifty (50) feet wide east of and immediately adjoining the parcel above described, and extending from the easterly line of said Brentwood road to the northerly line of
3 Florida avenue. The last mentioned parcel to be used for relocating and changing of said Brentwood road; said relocation and change of said road on and over the fifty foot strip herein described being desired and necessary because of the impracticability of carrying said road over or under the tracks of the said company crossing said road north of Florida avenue.

The condemnation of all of said described property is necessary to enable the Baltimore and Ohio Railroad Company to carry into effect the purposes of said act of Congress of February 28, 1903, in the construction of passenger and freight terminals and the necessary tracks and approaches thereto.

Now, in pursuance of the provisions of said act of Congress of February 28, 1903, and of the other acts of Congress therein referred to, the said Baltimore and Ohio Railroad company, a corporation as aforesaid, deposits this instrument of appropriation and description of said land and premises, rights and interests, intended to be appropriated and acquired, with the clerk of this court.

That the said piece or parcel of land, which is unimproved, is now held and owned by Francis Winslow, Augustus Jay and the American Security and Trust Company, substituted trustees, under the will of Catharine Pearson, deceased, who hold the same for the use and benefit of Kate La Montague, Harriet Winslow and Elizabeth P. Patterson, under said will, and under a deed from said Kate La Montague, Harriet Winslow and Elizabeth P. Patterson, dated November 19, 1902, and recorded December 2, 1902, in Liber 2676, folio 465, of the land records of the District of Columbia, and said property is unencumbered.

4 That the Baltimore and Ohio Railroad Company has endeavored to contract with the above named owners for the purchase, use and occupation of said lands held by them as aforesaid, for the purposes aforesaid, but has not been able to come to an agreement with the said named parties, or any of them. Said company is, therefore, advised that by virtue of the provisions of said act of Congress of February 28, 1903, and the other acts therein referred to, it is authorized to institute proceedings for the condem-

nation of the hereinbefore described lands required for the purposes aforesaid, for which said parcel of land and premises your petitioner tenders itself ready and willing to pay just compensation to be ascertained in these proceedings, which are in accordance with the provisions of the act of Congress quoted.

That the owners and holders of the legal title of said property, as appears from the land records of the District of Columbia, are Francis Winslow, Augustus Jay and the American Security and Trust Company, trustees, and that the beneficial owners of said described property are Kate La Montague, Harriet Winslow and Elizabeth P. Patterson.

Wherefore, and to the end that the Baltimore and Ohio Railroad Company may acquire and hold all of the pieces or parcels of land described herein for the purposes indicated, it prays

First. That the said land and property described in this instrument of appropriation may be condemned for the purposes of providing terminal facilities for the passenger and freight traffic, right of way and approaches to freight and passenger terminals of the Baltimore and Ohio Railroad Company, and fee simple title thereto be vested in said company.

5 Second. That this court will direct the United States marshal for the District of Columbia to serve a copy of this instrument of appropriation upon the several owners, legal and beneficial, of said land, and to forthwith make a return of said service to this court, and to attach or affix a copy of said instrument of appropriation to and upon said described land and premises, according to the rule of this court in such cases made and provided, unless all of said parties shall enter their appearance herein.

Third. That this court will, upon proper proof of service of this instrument of appropriation, as herein prayed, appoint three disinterested, competent and discreet freeholders of the District of Columbia, none of whom shall be interested in said land, or a stockholder in, or employed by, or connected with said company, to appraise the damages which the owners of said land may sustain by reason of such appropriation, and to make return thereof to this court, as by law provided.

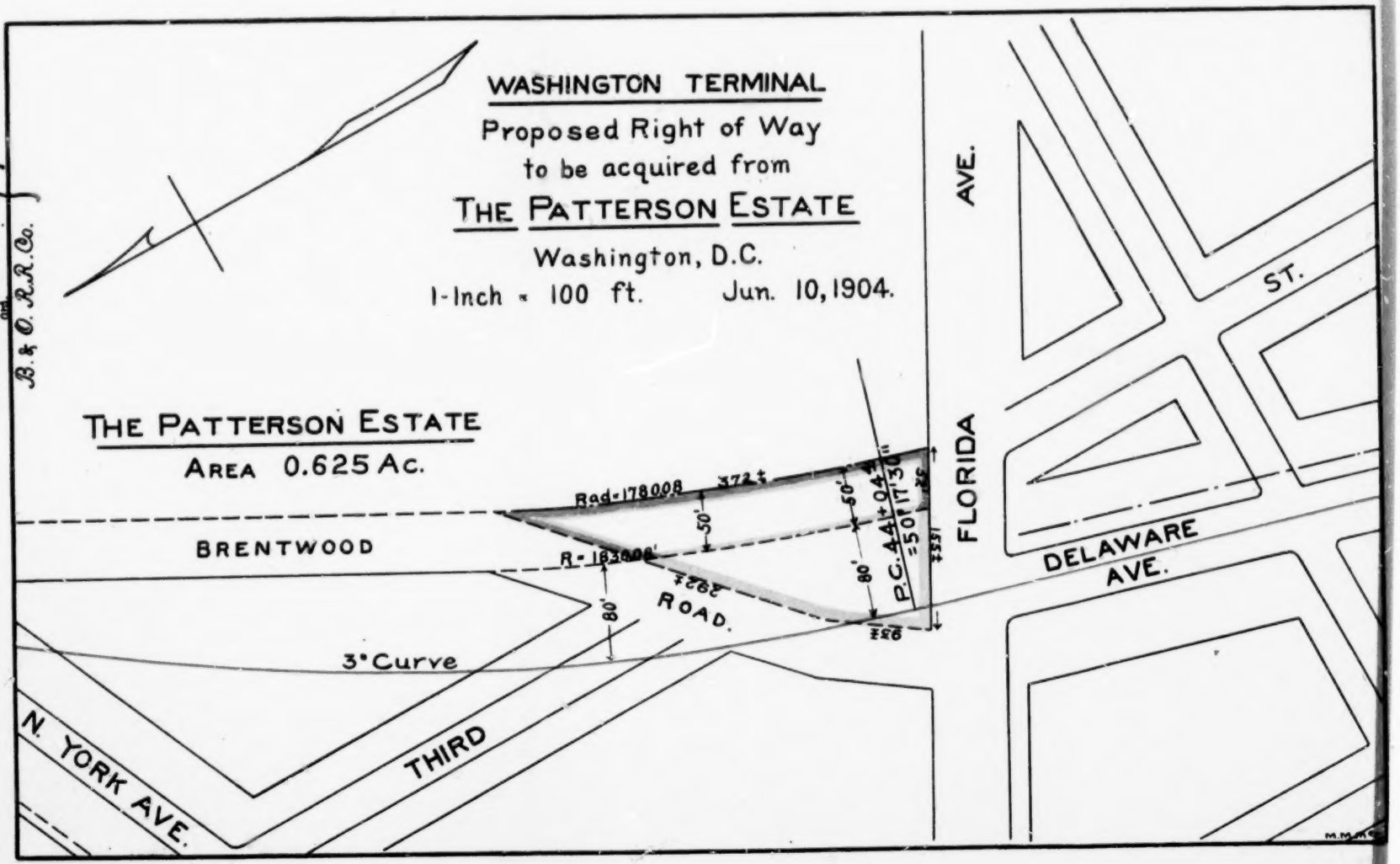
And for such other and further relief as to the court may seem meet, the nature of the case may require, and as the aforesaid act of Congress provides for and directs.

BALTIMORE & OHIO RAILROAD CO.,
By J. F. LEGGE, *Agent.*

GEORGE E. HAMILTON,
Att'y for Petitioner.

I, J. F. Legge, terminal agent, of the Baltimore and Ohio Railroad Company, do solemnly swear that I have read the fore-
6 going instrument of appropriation filed by the Baltimore and Ohio Railroad Company, and know the contents thereof; that

"B" No. 1570. F. Winslow et al vs. B. & O. R.R. Co. } Pr. 7.



the matters therein stated upon knowledge are true, and those stated upon information and belief, I believe to be true.

J. F. LEGGE.

Subscribed and sworn to before me this 22" day of August, A. D. 1904.

WALTER F. DONALDSON,
Notary Public, D. C.

[SEAL.]

(Here follows diagram, Plan B, marked p. 7.)

8 *Order.*

Filed September 1, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In the Matter of the Condemnation by THE BALTIMORE AND OHIO RAILROAD COMPANY of part of a tract of land located in the county of Washington, District of Columbia, and formerly known as "Youngsborough," described as follows: Beginning at the northeast corner of Florida avenue and Brentwood road, thence in a northeasterly direction along the easterly side of said Brentwood road 93 feet, more or less, to an angle in the easterly line of said road; thence northeasterly along said east line to a point 80 feet distant, measured on a radial line from the centre line between the Pennsylvania and Baltimore and Ohio main tracks as they will be constructed across said Brentwood road, said centre line being the 3 degree curve shown in red on blue print hereto attached; thence southerly on a line parallel and 80 feet distant from the said above mentioned centre line a distance of 244 feet, more or less, to the north line of said Florida avenue; thence in a northwesterly direction along the northerly line of said Florida avenue a distance of 103 feet, more or less, to place of beginning. The above described tract to be used for right-of-way purposes. Also a strip of ground 50 feet wide east of and immediately adjoining the parcel above described, and extending from the easterly line of said Brentwood road to the northerly line of Florida avenue. The last mentioned parcel to be used for relocating and changing of said Brentwood road. District docket, No. 626.

Upon consideration of the instrument of appropriation of the above named corporation, the Baltimore and Ohio Railroad Com-

pany, it is by the court this 1st day of September, A. D, 1904, adjudged and ordered that said petition be filed.

9 And it is further ordered that said owners, trustees and beneficial owners, and all other persons having any right, title or interest in said described property, be, and they are hereby required to appear in this court on or before the 10th day of September, A. D. 1904, and show cause, if any, they, or any of them, have, why the prayers of the petition in this cause should not be granted, and why this court should not then proceed as directed by the act of Congress above referred to, it appearing to the court from the assent hereto of counsel for the parties in interest, that the service, notice and publication required by the rules of court are obviated by the voluntary entry in these proceedings of the appearance of the said parties.

THOS. H. ANDERSON, *Justice.*

I consent to the foregoing order.

WM. G. JOHNSON,
Solicitor for Trustees & Cestuis Que Trusts Named in Petition.

10 *Answer of Francis Winslow et al.*

Filed September 13, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re the Condemnation by THE BALTIMORE AND OHIO RAILROAD of Part of the Tract of Land in the District of Columbia Known as "Youngsborough." No. 626, D. C.

The answer of Francis Winslow, Augustus Jay, and the American Security and Trust Company, trustees, and Kate la Montagne, Harriet Winslow, and Elizabeth P. Patterson to the rule toshow cause herein issued on the instrument of appropriation filed herein by the Baltimore and Ohio railroad.

These respondents admit that the legal title to the real estate in said instrument of appropriation described is vested in Francis Winslow, Augustus Jay and the American Security and Trust Company as trustees, and that the respondents Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson are the *cestui que trust* and beneficiaries of said trust.

Respondents further show that the said parcel of land in the said instrument of appropriation described is an undivided and nonsegregated portion of an entire tract of land vested in the said trustees for the benefit of the said *cestui que trust,* which said tract abuts upon the Brentwood road from Florida avenue in the city of Washington to a point co-incident with the continuation of the north line

of New York avenue extended where said line intersects the
11 said Brentwood road as shown on the plat hereto attached marked "Exhibit A." That the said land is bounded on the north by a tract of land conveyed to the Real Estate and Improvement Company of Baltimore City by the said respondent trustees by deed recorded July 28, 1900 in Liber 2522 at folio 37 of the land records for the District of Columbia, on the east by the lands of the Columbian Institution for the Deaf and Dumb, on the west by the Brentwood road and on the south by Florida avenue, all which appears by said Exhibit A.

Respondents further show that the said The Real Estate and Improvement Company of Baltimore City is a body corporate, affiliated with the Baltimore and Ohio Railroad Company and that the said land on the north of respondents' property was acquired by said improvement company for the use and benefit of the said Baltimore and Ohio Railroad Company, and is actually used and occupied by the said Baltimore and Ohio Railroad Company and was acquired by said improvement company for said railroad company for the purposes of carrying out the scheme of its new terminals in the city of Washington.

Respondents further show that the entire Brentwood road from Florida avenue on the south to the said intersection with the northerly line of New York avenue extended is also the property of these respondents, the title thereto being vested in the said trustees on the same trust and by virtue of the same conveyances by which the entire land hereinbefore referred to is held by said trustees.

Further answering said rule these respondents say that they are advised and believe and therefore aver that the said Baltimore and Ohio Railroad Company is not authorized by the acts of Con-
12 gress in the said instrument of appropriation referred to nor by any other legislation to acquire by condemnation the land in the said instrument of appropriation referred to, and they deny the right of the said Baltimore and Ohio railroad to acquire the same by condemnation, and deny the power and jurisdiction of this court to adjudicate any condemnation thereof.

Further answering these respondents say that by the acts of Congress of February 12, 1901, and February 28, 1903, the Congress of the United States provided a general scheme and system of steam railroad terminals within the city of Washington and prescribed the rights of the said railroad company, the location of its tracks, the lands which it should acquire and the streets and avenues which should be closed as abandoned in order to the effectuation of the plan by Congress adopted. That by section three of the act of February 12, 1901 (31 Stats. at Large, page 775) it was enacted that the Brentwood road from Florida avenue to S street should be forever closed and abandoned as a public highway, and by section five of the act of February 28th, 1903 (32 Stats. at Large, page 912) it was provided that the said Brentwood road from the south side of S street to the line of Seventh street east should also be forever closed

and abandoned as a public highway. That by the act of February 12th, 1901 and the act of February 28th, 1903, it was provided that the said Brentwood road should not be closed or abandoned until all the land abutting on both sides thereof should have been acquired by the said railroad company or its associates in the enterprise of constructing said terminals. That these respondents are advised and therefore charge that the said railroad or its
13 associates in said enterprise have acquired all the land abutting on both sides of said Brentwood road from the line of Seventh street to the intersection of the north line of New York avenue extended and all the land abutting on the westerly side of said road from Florida avenue to the said northerly line of New York avenue extended but neither the Baltimore and Ohio railroad nor any of its associates in the enterprise of building said terminals has acquired the tract of land abutting on the easterly side of said Brentwood road between Florida avenue and the northerly line of New York avenue extended.

Further answering these respondents say that they are advised and believe and therefore charge that the said railroad company is not authorized under the law to acquire any lesser portion of the land of these respondents abutting on the Brentwood road than the whole of said land as prescribed in the said acts of Congress, and that the attempt of the said railroad company by its instrument of appropriation herein to select for condemnation an arbitrary part of said tract is unauthorized, null and void.

Further answering these respondents say that the declared purpose of said railroad company in said instrument of appropriation to use a portion of the land so arbitrarily selected by it for the purpose of deflecting and continuing Brent- road from its present location through the said parcel of land attempted to be condemned is *ultra vires* and void. That the said railroad company is not authorized by any law to lay out or create public highways within the District of Columbia other than its own public right of way, and that it is not empowered to repeal the acts of Congress declar-
14 ing the said Brentwood road to be closed and forever abandoned as a public highway, and to relocate and re-establish said Brentwood road as a public highway in defiance of the acts of Congress referred to.

Further answering these respondents say that they are advised and believe and therefore charge that no person or corporation is competent to lay out a public highway or street within the District of Columbia through lands owned by any such person or corporation except with the approval of the Commissioners of the District of Columbia in conformity with the provisions of the acts of Congress in that behalf. That by the legislation of Congress providing for a permanent system of highways within the District of Columbia no public street, road or highway can be laid out through the land of these respondents except in conformity with existing streets in the city of Washington and that the proposed deflection of the Brent-

wood r d in the said instrument of appropriation designated does not conform with nor attempt to conform with the legislation of Congress as to the extension of highways and is in fact an attempt to preserve as a public highway a part of the said Brentwood road expressly closed and forever abandoned as a public highway by the provisions of the act of Congress of February 12th, 1901.

Respondents further show that the Brentwood road is the only western front of the tract of land of these respondents and when closed by the act of Congress said land is deprived of its entire western front.

Your petitioners therefore pray that the said rule may be discharged, that the instrument of appropriation in these pro-
15 ceedings filed by the Baltimore and Ohio Railroad Company be adjudged to be null and void, and that this proceeding be dismissed.

FRANCIS WINSLOW,
AUGUSTUS JAY,
AMERICAN SECURITY & TRUST COMPANY, *Trustees*,
KATE LA MONTAGNE,
HARRIET WINSLOW,
ELIZABETH P. PATTERSON,
By WM. G. JOHNSON, *Att'y.*

WM. G. JOHNSON,
Att'y for Respondents.

(Here follows diagram, Exhibit A, marked p. 16.)

17 *Amendment to Answer of Winslow et al.*

Filed October 7, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re the Condemnation by THE BALTIMORE AND OHIO RAILROAD of Part of the Tract of Land in the District of Columbia Known as "Youngsborough." No. 626, District Docket.

The amended answer of the respondents herein shows that the second section of the map of the permanent system of highways in the District of Columbia without the city of Washington, provided f in the act of Congress of March 2, 1893, was duly prepared and

approved as required by said act, and on the 16th of April, 1898, the same was filed and recorded by the surveyor of the District of Columbia as required by said act of Congress: and that thereupon the said second section, so approved and filed as aforesaid, became, as matter of law, a binding diagram of the only lawful extension of public highways through the land mentioned in these proceedings.

These respondents attach hereto a plat of the said land marked Exhibit B on which is delineated all the streets authorized by said second section to be located in and upon the said land in these proceedings mentioned, which it is prayed may be taken, and read as a part hereof.

Respondents further show that none of the streets delineated on said second section of said map as being in or upon
18 the land in these proceedings mentioned has ever been opened or dedicated to the public nor have any proceedings been instituted to condemn any of the land in these proceedings mentioned for the purpose of any of the said highways.

These respondents further show that so much of Third street east as is laid out, by the said second section of said map, through the land of these respondents, is completely vacated and abandoned and closed to public use, and the laying out and use of the same as a public highway are forever prohibited by the third section of the act of Congress approved February 12, 1901 (31 Statutes, 775).

FRANCIS WINSLOW,
AUGUSTUS JAY,
AMERICAN SECURITY & TRUST COMPANY, *Trustees*,
KATE LA MONTAGNE,
HARRIET WINSLOW,
ELIZABETH P. PATTERSON,
By W. G. JOHNSON, *Att'y*.

(Here follows diagram, Exhibit B, marked p. 19.)

20 *Order Appointing Appraisers.*

Filed October 18, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In the Matter of the Condemnation by THE BALTIMORE & OHIO RAILROAD COMPANY of Certain Lands in the County of Washington. No. 626, District Docket.

Upon consideration of the instrument of appropriation filed herein by the Baltimore & Ohio Railroad Company, the rule to show cause issued thereon against the several respondents, and it appearing to the court, that said respondents have, through their counsel, entered their appearance herein, and upon consideration of the answer and the amended answer, filed herein, by said respondents to said rule to show cause, it is by the court this 18th day of October, A. D. 1904, ordered that Clement W. Howard, John A. Hamilton and Robert I. Fleming, being disinterested free-holders residing in the District of Columbia, be and they are hereby appointed appraisers to appraise the damages which the several owners of the parcels of land in said instrument of appropriation described or other persons interested therein may sustain by reason of said appropriation, and it is further ordered that the United States marshal for the District of Columbia forthwith serve a copy of this order on each of the respondents if they be within the District of Columbia, or upon their attorneys of record.

ASHLEY M. GOULD, *Justice.*

21 *Marshal's Return.*

Served copy of the within order on William G. Johnson, personally Oct. 18, 1904.

AULICK PALMER, *Marshal.*
S.

Instructions to Jury.

Filed October 19, 1904.

In re Condemnation of Part of Youngsborough, Use of BALTIMORE & OHIO RAILROAD. No. 626, Dist. Court.

* * * * * * *

The property described in these proceedings is to be appraised at its fair market value with reference to the most advantageous uses to which it can be put by private persons or corporations; and by

market value is meant what the property would sell for in cash, or on terms equivalent to cash, when offered for sale by one who desires but is not obliged to sell to one who desires but is not obliged to buy. What might be offered by one who desired to buy on time for purely speculative purposes, or the additional value, if any, the property may have acquired, by its designation by Congress as the site for the Union station and terminals, should not be considered as a basis for or in any way influencing the appraisement.

If said property by reason of its location, surroundings,
22 natural advantages, or intrinsic character, is peculiarly adapted to some particular use by private persons or corporations, the circumstances which make up such adaptability may be considered.

In determining the value of the land mentioned in this petition, the commissioners are instructed that they must exclude from consideration the fact that the location of the Union station and freight terminals by acts of Congress has created an added demand for the land within said area, and that what the petitioner has paid for land, at present sale, within said area, for the purpose of avoiding condemnation proceedings, is not a criterion of value.

The commissioners shall not take any evidence offered in behalf of any owner or owners tending to prove offers made to any one or more of them by intending purchasers or others, to buy said property at any sum or sums of money, or to exchange the same for other property or commodity; but they shall consider any evidence offered by the petitioner against said owners tending to prove their declarations as to the value of their properties, or their offers of them at a fixed price; but the commissioners are instructed that said declarations or offers must be so recent as reasonably to apply to the present value of said properties.

If there are several interests, as estates for life or remainder, or leasehold and reversion, in one parcel, the proper course is to ascertain the entire compensation to be paid for the fee simple not divided into successive interests, but as if belonging to one person, and then
to determine the market value of such estate for life or lease-
23 hold; and, afterwards, by deducting the same from the valuation of the fee simple, ascertain the value of that remainder or reversion.

The commissioners will themselves view the property, and they will also hear such parties in interest as may demand to be heard touching the value of their respective interests, and may take other testimony, not herein excluded, as to values; to which testimony they are to give only such weight as, in their judgment, it may be entitled to, and they may, in their discretion, limit the number of the witnesses to be examined upon any particular branch of the case.

The petitioner will first be given an opportunity to offer such evidence as may be desired touching the boundaries of the property described; then the owners and other parties in interest may intro-

duce evidence in such order as to said property as the commissioners may deem convenient touching the value of their respective interests. The petitioner may then introduce evidence in reply, and the owners and other parties in interest may introduce rebutting evidence.

The marshal will provide suitable accommodations for the sittings of the commission in the court house building, and will in person, or by deputy, attend their sessions and preserve order during the same, and will summon such witnesses as may be desired by any party to the cause.

The commissioners will fix their own days and hours for meetings, and the length of their sessions, but should proceed with all reasonable dispatch to the completion and return of the assessment, and all adjournments should be to a day and hour certain.

24 Having completed their labors, the commissioners will return their appraisement, in writing, to the court.

ASHLEY M. GOULD, *Justice.*

Report of Commission.

Filed November 21, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In the Matter of the Condemnation by THE BALTIMORE AND OHIO RAILROAD COMPANY of Certain Lands in the County of Washington. No. 626, District Docket.

We, the undersigned, commissioners or appraisers duly appointed by order of the court heretofore passed in the above-entitled cause to appraise the damages which the owners of part of a tract of land located in the county of Washington, District of Columbia, known as the Patterson estate, situated at the intersection of Florida avenue, Delaware avenue, and Brentwood road, containing an area of 0.625 part of an acre, mentioned and described in the proceedings had herein should sustain by reason of the appropriation by the petitioner, The Baltimore and Ohio Railroad Company, submit to the honorable court the following report of our proceedings and actions in the premises.

We first severally took and subscribed an oath that we were residents of the District of Columbia, and freeholders therein, and that we were not related in any way to the parties who are interested in the land sought to be condemned in these proceedings, and

25 that we had no interest whatever in the same; and that we would, without favor or partiality, to the best of our judgment, skill, and ability, consider and assess the injury and damages which the owners of the land might sustain by reason of the prop-

erty to be taken by the petitioner, The Baltimore and Ohio Railroad Company for the injury to be done thereto by these proceedings, and to return such estimate forthwith of such damages and injury, to the honorable court.

After due notice to all of the parties in interest, we met at the court house building in the city of Washington, District of Columbia, on the 19th day of October, A. D., 1904, at ten o'clock a. m., and were sworn in, received our instructions, organized, and then adjourned until October the 21st, A. D., 1904, at 11.30 o'clock, a. m., at which time we met upon the premises—the property of the Patterson estate, at the intersection of Florida avenue, Delaware avenue, and the Brentwood road.

We then viewed and examined the said property of the said Patterson estate; after so viewing and examining the same, and after due notice to the respective parties in interest, we met at the court house building on the 27th day of October, A. D. 1904, adjourning to meet thereafter, at the same place upon days and at hours certain, by adjournment from time to time, and always at a definite hour and place, up to and including the 21st day of November, A. D., 1904, for the purpose of hearing such parties in interest as desired to be heard touching the values of their respective interests, and the injury and damage to the tract of land part of which is proposed to be taken, and after — at such meetings, heard such parties and the evidence adduced in their behalf touching the values of
26 their respective interests and the injury and damage which they might sustain by these proceedings and having also heard the evidence adduced on behalf of the petitioner touching such values and such injury and damage, and having given all the parties in interest an opportunity to be heard in argument by counsel for said parties in interest including the petitioner, and having fully considered the matter in executive session from the 17th day of November A. D., 1904, until the 21st day of November, A. D., 1904, upon the evidence as well as upon our own personal views, and examination aforesaid, we appraised and assessed the value of the respective interest of the owner, or owners of the tract of land now known as the Patterson estate, and also the parcel or strip of land proposed to be taken from said tract, in the city of Washington, District of Columbia, as well as the injury and damage sustained by them by reason of the appropriation of said land by petitioner, and by reason of the injury and damage to the remaining part of the Patterson tract, and these proceedings — as is set forth herein below—viz:

We appraised the value of the strip of land at the intersection of Florida Ave., Delaware Ave. and Brentwood road, known as the Patterson estate containing 27,225 square feet of land (@) $1.30 per ft.....	$35,392.50
The injury and damage to the remaining part of the tract as named.....	10,000.00
Total.....	$45,392.50

We further return to the honorable court all the volumes of the testimony taken before us and marked respectively from 1 to
27 4, and all the exhibits filed with us, and marked respectively 1 to 2.

Respectfully submitted

ROB'T I. FLEMING,
JOHN A. HAMILTON,
C. W. HOWARD,
Commissioners or Appraisers.

November 21/1904.

28 *Testimony on Behalf of Petitioner.*

Filed November 21, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In the Matter of the Condemnation by THE BALTIMORE & OHIO RAILROAD COMPANY of Part of a Tract of Land Located in the County of Washington, District of Columbia, and Formerly Known as Youngsborough.

OCT. 27, 1904.

Before Commissioners Robert I. Fleming, Clement W. Howard, and John A. Hamilton.

Present on behalf of the petitioner, Messrs. Hamilton & Colbert.
Present on behalf of the respondent, W. G. Johnson, Esq.

Testimony on Behalf of Petitioner.

WILLIAM B. TURPIN, a witness of lawful age, called by and on behalf of the petitioner, having been first duly sworn, is examined,

By Mr. HAMILTON:

Q. What is your full name? A. William B. Turpin.
Q. You are a real estate agent? A. I am, sir.
Q. And have been in that business for how long? A. For sixteen years.

Q. You are acquainted, generally, with the value of real
29 estate in the District of Columbia? A. I am.
Q. Have you any particular knowledge of the tract of land described in this proceeding, which is described as a part of Youngsborough? A. Yes, sir.

Mr. GEORGE A. HAMILTON: This plat, Mr. Johnson, was made by the engineer of the company, who is today confined to his house by

rheumatism. I could not have him here to prove the plat, but if desirable I will have him here later.

Mr. JOHNSON: This is the plat that accompanies the petition filed?

Mr. GEORGE A. HAMILTON: Yes, sir; and if desirable I will have him here at a later date to prove the lines of survey he has laid down on this plat. But for the purposes of this examination I suggest that the plat may be taken as accurate. It will be corrected if there is an inaccuracy in it.

Mr. JOHNSON: I have no doubt that it is accurate so far as the metes and bounds are concerned, and everything else that appears on it; but I think we ought to have before the commission just what this project proposes; and if this engineer knows about these matters he ought to come here and testify with reference to elevations, grades, tracks, &c.

Mr. GEORGE A. HAMILTON: I will have him here.

Mr. JOHNSON: So far as the dimensions are concerned, I
30 have no doubt it is correct.

Mr. COLBERT: You will admit them to be correct?

Commissioner FLEMING: You will admit them to be correct; but you want the engineer to come to give us the details?

Mr. JOHNSON: Yes, sir. There is also another matter we ought to have understood with respect to the question of values. As I understand it, under the instructions of the court, we have the opening and closing on that question. I have no objection to the petitioner offering testimony of that sort now, if they like; I do not want, however, my position disturbed by going on now with their testimony.

Mr. GEORGE A. HAMILTON: Suppose yon go on with your testimony now?

Mr. JOHNSON: I am not prepared. I expected that the railroad company would, this morning, offer such evidence as it deems proper with respect to the subject matter of the condemnation, the area, grades, location of the railroad tracks, and whatever other matters of engineering detail might affect the situation, before taking up the question of values, and after that, if it was deemed necessary, they could go on with the question of values. I have no objection to Mr. Hamilton going on with the evidence of value now, which, in the ordinary course, would be in response to our case. You have the witnesses here, and I am perfectly willing to have them examined out of order, so to speak, wishing simply to retain my rights.

31 Mr. GEORGE E. HAMILTON: There is only one objection to that which I can see,and possibly an understanding might do away with that objection entirely. If any testimony should be required in answer to your testimony, I think we should be allowed to introduce evidence in reply.

Mr. JOHNSON: That is all right. I do not care anything about

that. I only want it understood that we do not lose our right to close the evidence on this question of value.

By Mr. GEORGE E. HAMILTON:

Q. You are familiar with the ground located in the lines of the proposed condemnation proceedings? A. I am, sir.

Q. Have you made any recent investigation of that property, for the purpose of testifying? A. I was over the property yesterday, very thoroughly.

Q. Are you familiar with the prices of property in the neighborhood of this land? A. I have recently made five large sales immediately west of the railroad property, and right across the railroad from this.

Q. Outside or inside of the city limits? A. Four of them were outside of the city limits, and two were within the city limits.

Q. The instructions to the commissioners as to the subject-matter generally, is that the property described is to be appraised at
32 its fair market value, with reference to the most advantageous use to which it can be put by private persons or corporations; and by market value is meant what the property would sell for in cash or on terms equivalent to cash, when offered for sale by one who desires but is not obliged to sell, to one who desires but is not obliged to buy. Looking at the property in the light of that rule of appraisement, will you give to this commission your opinion as to the value of this property? A. As of the present date?

Q. As of the present date. In that value, however, you are not to take into consideration the added value which may have come to the property by reason of the act of February, 1903, providing for the terminal station. A. Including all these things, I consider this property to be worth 45 cents a foot. I would like, with the permission of the commission, if it is in order, to tell what I have sold other ground, immediately west of the railroad property, for.

The CHAIRMAN: You may proceed.

A. I have made three sales there within the last year, of large pieces of property. One fronted 191 feet on Florida avenue by about 350 feet on Eckington place.

By the CHAIRMAN:

Q. How close to this property? A. Eckington place is east of First street, and this is about on a line, roughly speaking, with Third street. It is immediately across the railroad properties. I
33 sold that property for about 52 cents a foot. I sold a piece of property on Eckington place and Q street, fronting about 100 feet on Eckington place and about 300 feet on Q street for 51 cents a foot. I have closed, within the last month, the sale of a lot fronting 96 feet on Florida avenue, by a depth of about 350 feet at 45 cents a foot. That is the next piece of property to Eckington place, and about on a line with First street east.

By the CHAIRMAN:

Q. How close is that to the freight depot? A. Two pieces out of the three front on the freight station, and the other piece is the adjoining property on the west.

By Commissioner HAMILTON:

Q. Is it near where McDowell is putting up his place? A. McDowell's place is one of the places I refer to.

By Mr. GEORGE E. HAMILTON:

Q. These sales which you made were not made to the railroad company? A. No, sir; not to the railroad company.

Q. In your opinion is the land in question more desirable for business or for residence purposes? A. I do not think it is very desirable for either.

Q. Looking at it for the purpose of business property, and comparing it with the property you have sold, is it more or less desirable? A. I think it is less desirable.

34 Q. Why? A. Because it is on the other side of the railroad tracks, away from the town.

Q. Looking at that plat which you have in your hand, which is a copy of the plat attached to the petition in this case, and which is to be hereafter offered in evidence, state whether, if the Brentwood road is extended down in the lines that are indicated by the two easternmost red lines on the plat of the property in question, the taking of that property would be detrimental to the balance of the tract called Youngsborough, east thereof? A. I do not understand your question.

Q. If the Brentwood road is diverted from its present course, and carried on the lines I have just pointed out, the two red lines—you have those before you? A. Yes, sir.

Q. Would the taking of this property have a detrimental effect upon the balance of the Patterson tract, to the east? A. I do not think it would.

Q. The purpose of this condemnation is to take all of the land included within this portion (indicating) shown on the plat. This easternmost part of it is for the purpose of locating the Brentwood road and the balance for railroad occupation, thus throwing the Brentwood road to the east of the property taken for occupation. A. You mean, in other words, that the Brentwood road is to be extended out there (indicating)?

Q. Yes, sir. A. I think that is a positive benefit to the

35 property.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Turpin, you speak of three sales you have made to the west of this property. The first one you mentioned was of property on Florida avenue and Eckington place? A. Yes, sir.

Q. On which side of Eckington place was that; on the east or the west side? A. On the west side.

Q. When was that sale made? A. About a year ago.

Q. At that time had the railroad acquired the land on the east side of Eckington place? A. Yes, sir.

Q. They owned it? A. They owned it.

Q. Do you remember to what purpose it was devoted? A. At that time the freight stations were almost completed, and there were quite a number of tracts there.

Q. It was entirely railroad occupation for railroad purposes? A. Entirely; for freight yards.

Q. I have forgotten the location of the other two pieces which you say you sold. A. They were both adjoining, one on the north and the other on the west.

36 Q. Of this other piece? A. Yes.

Q. You looked at this property yesterday? A. Yes, sir; I looked at it yesterday.

Q. When did you see it before yesterday? A. I have been fairly familiar with it for a number of years.

Q. I am asking you when you saw it, prior to yesterday? A. Probably as much as three or four months ago. I have not been there since they began to cut the grade down.

Q. Had you seen it prior to 1903; between 1901 and 1903? A. Yes, sir.

Q. You had been in that neighborhood? A. Yes, sir.

Q. Did you observe any difference in the Brentwood road on yesterday, and what it was before that time? A. The Brentwood road was a little bit hard to locate on yesterday.

Q. It was pretty well torn up? A. It was pretty well torn up at this point, along the line of this property.

Q. As a matter of fact, that part of the Brentwood road is to be temporarily used by the railroad in its operations; is it not? A. Yes; they seem to be putting tracks on it.

37 Q. Was there a barrier across it? A. No, sir.

Q. Or a fence? A. No, sir.

Q. Did you ever see a fence across it, within the last few months? A. I don't remember ever having seen a fence there. I am pretty sure there was no fence there yesterday.

Q. You were not out there during last spring and winter? A. I have been out in that neighborhood very frequently right along, but I do not remember to have seen a fence across it.

Q. You do not remember to have seen a fence across Florida avenue? A. No, sir.

Mr. GEORGE A. HAMILTON: It might expedite matters, Mr. Johnson, to admit that under an order of the District Commissioners the Brentwood road has been temporarily closed for the purposes of construction, or rather that the right of occupation has been granted to the company for the purposes of construction.

Mr. JOHNSON: I am not going to make any controversy about that. I only desire to call his attention to the difference between the condition of affairs yesterday and the condition some time ago, before this work commenced.

By Mr. JOHNSON:

Q. You were asked if this property to be taken was more desirable for business or residence purposes, and, as I noted your
38 reply, you said you did not think it was desirable for either. A. No, sir.

Q. What other purpose can property be put to than business or residence purposes? A. No other purpose that I know of.

Q. So that it is not desirable for any purpose? A. That is right sir.

Q. Then it is not worth anything? A. Yes, it is. I have testified that I thought it was worth 45 cents a foot.

Q. Would you give 45 cents a foot for property that is not worth anything for any purpose? A. No; I did not say that. I said it was not desirable.

Q. Then the word "desirable" to your mind has some peculiar meaning. A. It is always a relative term.

Q. It is desirable to the extent of 45 cents a foot? A. Yes, sir.

Q. It is more desirable than 45 cents a foot would be? A. It is as desirable as 45 cents a foot would be.

Q. You saw the Brentwood road before the railroad went in there and tore it up and rendered it indistinguishable from the rest of the territory? A. Yes, sir.

Q. Do you know the property on the west side of the Brent-
39 wood road immediately opposite this rhomboidal tract? A. Yes, sir.

Q. How was that known? A. That was the old Daish property.

Q. Do you know what the ground there brought? A. I do not. I believe though it brought something like $1.75 a foot. That is my recollection.

Q. You do not know? A. I do not. I knew at the time, but it has escaped my memory. It is a matter of record here in the court.

Mr. GEORGE A. HAMILTON: May I tell him what it was?

Mr. JOHNSON: Yes.

Mr. GEORGE A. HAMILTON: Are you talking about the part that was condemned or the part that was purchased?

Mr. JOHNSON: Both.

Mr. GEORGE A. HAMILTON: I will say that the company pur-

chased the majority of that square where the Daish property is for $1.10 a foot, and upon condemnation the Daish property was appraised at something in the neighborhood of $1 a foot.

Mr. JOHNSON: My impression was that it was $1.55 a foot for the ground.

Mr. GEORGE A. HAMILTON: For the ground without the improvements?

Mr. JOHNSON: Yes, sir.

Mr. GEORGE A. HAMILTON: I think we had better have a
40 reference to the proceedings and give it to the commission accurately.

Mr. JOHNSON: Yes; that will fix it.

By Mr. JOHNSON:

Q. Are you influenced in your judgment about the value of this property by the sales of Florida avenue and Eckington place? A. I am, most materially. I do not think any two pieces of property could be more alike than they are.

Q. There was another remark you made that I did not quite understand. You referred to this section that is the subject of condemnation as being on the other side of the railroad, away from the town. Just what do you mean by that? A. I think that we will all acknowledge that the town lies west of that railroad track and not east of it.

Q. Of which railroad? A. The tracks of the Baltimore & Ohio railroad.

Q. They have more than one set of tracks. A. The town lies west of those tracks.

Q. One part of the railroad goes out First street. The Metropolitan branch goes out First street, and the other part goes out Delaware avenue, and then out I and K streets until it gets out a considerable distance east of the Brentwood road. This tract lies between the two. To which do you refer? A. To the fact that the town lies west of the tracks here (indicating).

Q. West of the Metropolitan branch? A. West of the
41 Metropolitan branch, and that is certainly more than true of the other track, which I did not consider of much force in valuing the property, because it is a matter of only a few months, comparatively speaking, before it is done away with.

Q. Then when you speak of the situation with reference to the railroad you mean the railroad as it is to be. A. Of the railroad as it is to be and as it virtually is today. All the tracks are there except one double track, as I understand it.

Q. All the tracks are where? A. On the property immediately west of this triangle in controversy.

Q. Are you aware of the fact that the main tracks of the Baltimore & Ohio Railroad Company and the Pennsylvania Railroad Company coming in and going out of the city are to run out of Delaware avenue at this point? A. I am.

Q. Is that what you have in mind? A. That is what I have in mind.

Q. You are considering the fact that such is the railroad condition as it exists today? A. Yes.

Q. And you are considering it as though it were actually accomplished? A. Yes.

Q. And when that railroad is built there you regard this property, which immediately faces on it, as being of no considerable
42 value because of its proximity to that station. A. Yes, sir.

Q. As I read these figures on the plat, the frontage on the existing Brentwood road is 385 feet, that is 93 feet from Florida avenue to the angle and 292 feet, if I read it rightly, from that angle to the other side of the Brentwood road. Were you in any wise familiar with that road before it was obstructed and torn up by these operations? A. Yes, sir; I have been over it hundreds of times.

Q. Do you know anything about the grade of that part of the road from Florida avenue? A. As it exists now or as it used to exist?

Q. As it used to exist. A. It was a plain, even grade.

Q. Do you know anything about the grade of Florida avenue, as it will have to be when this railroad enterprise is completed? A. As I saw it there yesterday it looked to me as though it would probably be anywhere from 12 to 20 feet above grade.

Q. Florida avenue would be? A. No, the property would be.

Q. That is, Florida avenue would be lower by from 12 to 20 feet? A Yes; that is only an approximation.

Q. There is a project here to deflect Brentwood road and make it straighter. That is a matter that was called to your attention? A. Yes, sir.

43 Q. And thus shorten the line and also change the angle of the road? A. Yes.

Q. Those two features, the shortening of the frontage and the obliteration of the angle and the increase of the grade by the fall of Florida avenue from 12 to 20 feet, you think would make the frontage on the Brentwood road much more valuable than on the existing road? A. I think it would be more valuable. The question of grade, to my mind, does not enter into that at all, because the grade here (indicating) will be approximately what it was there. The old Brentwood road would probably be as high above grade as the new one would be.

Q. I am speaking of the conditions as they were before there was any disturbance of them. You have just told us that the Brentwood road was formerly a perfectly easy, natural grade, before the railroad went there and meddled with it. A. Yes.

Q. And now Florida avenue is to be depressed 20 feet, and the road, instead of being along and following the angle of the hill, is to be shorter and in a direct line. Those conditions certainly will make the ascent from Florida avenue very much steeper than they were before; will they not? A. I don't think so.

Q. As a matter of fact do you not think it would practi-
44 cally make it an impassable road? A. No more so than it would be in its present place. It is impassable today.

Q. But it was not before the railroad went there and made it impassable. A. No; it was not, but it is today.

Q. We are not to measure its value by damages that have been inflicted on it, but by its condition before any damage was done to it. A. What is your question.

Q. I want to try to get at why it is, that, considering these elements, you think that this other road would be a positive benefit? A. I say that the straightening of that road would be a positive benefit to the property.

Q. And in saying that you would consider that the grade of the new straightened road would not be less than the grade of the Brentwood road before the railroad touched it? A. I do not think that is a fair question. I say that the straightening of that road would make no difference whatever to the grade. There would be just as high a grade if the road was here as there would be if the road was put in its new location.

Q. But we are not talking about that. I am trying to bring your attention to the road as it was before, and to this deflected road as it will be. Do you understand the difference? A. I understand the difference.

45 By the CHAIRMAN:

Q. You know that this land at this point would be from 12 to 20 feet above grade. A. All of it.

By Mr. JOHNSON:

Q. But it was not 12 or 20 feet higher than the road before the railroad company went there and touched and interfered with it? A. No.

Q. Do you consider that there will not be a very heavy grade from Florida avenue up, in place of what before was practically level? A. That is practically the fact; but they have got 372 feet here to make that grade in.

Q. You do not know what that grade is? A. No, I do not. I say it is somewhere from 12 to 20 feet.

Q. And they have got 385 feet there (indicating) without any grade at all. Suppose there were no railroad here, and suppose the proposition was to change the Brentwood road from its present position to its new position. Why would that be a benefit to the rest of the tract? A. It would be a benefit to the rest of the tract, because it would square the property and give it a long straight frontage on the road instead of having the little triangle come down there and front on the road.

Q. So that if you made your frontage 372 feet instead of 385 feet, thereby reducing your frontage 13 feet, you would make
46 your property more valuable? A. I think that a straight

front of 372 feet would be more desirable than a front approximately 15 feet longer on an angle.

The CHAIRMAN: That would be without, the change of grade.

Mr. JOHNSON: That would be assuming that the grade was the same.

The WITNESS: Of course, assuming that the grade was the same.

By Mr. JOHNSON:

Q. So that, in your estimation, it would be good business to throw away that rhomboidal section west of the proposed deflection, just to make a street? A. No, sir; I understand that you get paid for it.

Q. In your estimate of the advantage of this deflection of the Brentwood road, do you include the grading and improvement of the road at public expense, or simply the leaving of it in a state of nature? A. Well, roads are generally made at public expense.

Q. I am not speaking about that. I am asking what you have in your mind. A. I have in my mind the making of that road as good as it is today.

Q. You mean the making of that road as good as the old Brentwood road was before? A. As good as it was before these
47 changes were made; yes, sir.

Q. You know that New York avenue, east of the Brentwood road, is not open? A. Yes; that is a fact.

Q. Do you know to what point, west of the Brentwood road, it is open? A. I do not know that. I do not remember.

Q. Do you know, approximately, anything about how near to that point it is actually open? A. I think it is open to near the west line of the Daish property; but I am not positive about that.

Q. Have you any idea about how far that would be from the Brentwood road? A. I should say from 150 to 200 feet.

Q. Do you know what property lies between that point and the Brentwood road? A. I do not know anything about that property, except that it is there.

Q. You do not know whose it is, or how it is used? A. No.

Q. Brentwood road is, by the terms of the statute, closed from the west side of Seventh street, east. Bearing that fact in mind, what added advantage would you say is derived from this deflection of the road?

Mr. GEORGE E. HAMILTON: I object to that, because the Brentwood road is not closed by the terms of the statute. It is only conditionally closed, according to the ruling of the court.

48 Mr. COLBERT: It is closed only when the railroad company buys the property on both sides of it.

Mr. JOHNSON: Of course, so far as that particular point is concerned, it has not been the subject of any final ruling.

Mr. GEORGE E. HAMILTON: Only by Judge Gould. He held that, as he interpreted the statute, it was not an absolute closing of the

road, but was only a conditional closing, when the company did certain things.

Mr. JOHNSON: There is no doubt that the court has held, in this case, the contrary to my contention, that is, that the closing of the Brentwood road at the point about which we are inquiring, is not mandatory. That is a matter for the courts and not for me to quarrel with, and I do not want to transgress any ruling of the court here. Of course, in addition to taking this testimony, we are endeavoring to preserve our rights for review on appeal, and I want to ask the question I have asked for the purpose of endeavoring to go into that matter. I think, perhaps, the commission ought to acquiesce in Mr. Hamilton's objection and decline to consider that feature of the case; but at the same time I want to make the inquiry, not for the purpose of transgressing the ruling of the court, but for the purpose of having the record show that I endeavored to go into it and the right was denied me, under the objection of counsel.

Mr. GEORGE E. HAMILTON: I think that is clearly a fair
49 statement of the situation. The court, so far as we have gone, has so ruled. Judge Gould said, in the District court, and of course his opinion may be reviewed by a higher court, that the Brentwood road at this point is not positively closed, but is to be closed only upon the doing of certain things by the railroad company which the company has not yet done, and that it is not to be considered as absolutely closed. I think my objection to Mr. Johnson's question should be sustained, and he should be given the benefit of an exception to that ruling.

The CHAIRMAN: The commission sustain the objection.

Mr. JOHNSON: I note an exception.

Redirect examination.

By Mr. GEORGE E. HAMILTON:

Q. Leaving out of consideration what has been done by the company under the Union Station act of February, 1903, and taking the situation as it exists now without that work, or as it existed prior to the beginning of that work under the act of 1903, what, in your opinion, would be the fair market value of the ground in controversy, under the instructions of the court which you have heard? A. As I said before 45 cents a foot.

E. J. STELLWAGEN, a witness of lawful age, called by and on behalf of the petitioners, having been first duly sworn, is examined,

By Mr. GEORGE E. HAMILTON:

50 Q. You are and have been for a number of years a real estate agent in the city of Washington? A. I have.

Q. And as such are familiar generally with the values of land in the District of Columbia? A. I am.

Q. Do you know the property in controversy here? A. I do.

Q. Will you state what, in your opinion, is the fair market value, as explained to the former witness by reference to the instructions of the court, and without reference to the passage of the act of Congress of February 1903? A. It is worth 50 cents a square foot.

Q. Is that without reference to anything done under the act of 1903? A. Without any reference to the railroad situation whatever.

Q. Are you familiar with the values of land in the vicinity of this property? A. I am.

Q. And your opinion is that this land is worth 50 cents a foot? A. That is my opinion.

Cross-examination.

By Mr. JOHNSON:

Q. When you put that valuation upon this property, do
51 you take into consideration the area of the tract? A. Yes.

Q. And its frontage? A. Yes, sir.

Q. You observe that there are 155 feet front on Florida avenue, and 385 feet on the Brentwood road? A. Yes, I am quite familiar with the dimensions.

Q. You have considered those matters? A. Yes, sir.

Q. Suppose there were fifty acres of it? A. It would not be worth any such money.

Q. How much a foot would it be worth then? A. Fifty acres of land in that situation—it would be pretty hard to figure what it would be worth. We sold a portion of the tract north of that for $5,500 an acre, being the other half of this estate, some years ago. I would be unable to say what it would be worth by the acre.

Q. I ask you what it would be worth by the foot? A. Treating it as acreage property would be a rather difficult problem. You could not use it for farming land, and you would have to consider it as a subject for subdivision. I could not answer that question. I am considering it merely as a lot on a corner, and comparing it in my own mind with other lots that have brought prices which justify me in feeling that this one, in particular, is worth 50 cents a foot.

Q. Do you know of any sale of a corner of that area, with such a frontage, right on Boundary street in the city for that price?
52 A. I have the corner of North Capitol and Florida avenue, which is outside of the city limits, for sale at 80 cents a foot.

Q. On which side? A. The northwest corner, on the north side of Florida avenue. There is a street-car line right there. We are only asking 80 cents a foot for it, and I expect would be glad to take a good deal less. At the corner of Second and Florida avenue I have another lot we are asking 75 cents a foot for, and we would be glad to sell it at that price. We have just sold the lot back of it at

75 cents a foot, on R street. Generally the sales of property there give me the idea that this is worth 50 cents a foot.

Q. You speak of having sold the northerly part of this ground for $5500 an acre. A. That is my recollection.

Mr. GEORGE E. HAMILTON: It was about $5300 an acre.

Mr. JOHNSON: The consideration was stated in the deed?

Mr. GEORGE E. HAMILTON: Yes, sir; and it was within a fraction of $5300 an acre.

By Mr. JOHNSON:

Q. I show you the plat which accompanies the answer of the defendants in this proceeding, on which you will observe a dotted line indicating the projection of the north line of New York avenue, as it would run if extended through this tract? A. Yes, sir.

Q. The property north of that line is the property to which
53 you refer? A. Yes, sir; that is the property.

Q. Do you remember how many acres there were in that tract? A. My rough recollection is that there were in the neighborhood of 50 acres; but I am not sure as to the quantity.

Q. It was not less than 50 acres? A. I am not sure as to the quantity of land.

Mr. GEORGE E. HAMILTON: I think it was fifty some odd acres.

By Mr. JOHNSON:

Q. The total consideration was in excess of $250,000? A. It was fifty some hundred dollars an acre.

Q. I am speaking about the total consideration. A. I do not remember that.

Q. How far is the southernmost point of that land from Florida avenue? A. I do not know the scale of the map.

Q. I thought perhaps you knew the location? A. No, sir; I do not know where that line would be.

Q. From Florida avenue to the point on the Brentwood road involved in this controversy is 385 feet? A. If that be so, then the other distance is about 1,000 feet, roughly speaking, from the north line of Florida avenue—the north line of New York avenue extended.

Q. You would estimate it to be about that? A. Yes, sir.

54 Q. The date of the transaction was in 1900? A. I do not remember the date. It was two or three years ago.

HAROLD E. DOYLE, a witness of lawful age, called by and on behalf of the petitioners, having been first duly sworn, is examined,

By Mr. GEORGE E. HAMILTON:

Q. You are a real estate agent? A. Yes, sir.

Q. Are you connected with the firm of Thomas J. Fisher & Company? A. Yes, sir.

Q. And have been for how long? A. For about 12 years.

Q. Have you had anything to do with the sales of land for that firm? A. I have had charge of the sales department for the last four years, and was in the sales department before that time.

Q. Have you a knowledge, generally, of values within the city and in the District? A. Yes, sir; I have.

Q. Do you know the locality in which the land involved in this proceeding is situated? A. I do.

55 Q. Bearing in mind the direction as to values which you have heard suggested here several times, and as contained in the instructions to the commissioners, what, in your opinion, without reference to the act of February, 1903, is the fair market value of the land intended to be condemned? A. I have concluded it was worth not over 50 cents a foot.

No cross examination.

Mr. JOHNSON: I want to reserve the right, after your engineer has been on the stand and testified to the physical details of this matter, to ask these witnesses some further questions if I desire.

Mr. GEORGE E. HAMILTON: All of them will be subject to your call.

The commission thereupon adjourned until Monday, October 31st, 1904, at 10.30 o'clock a. m.

56 WASHINGTON, D. C., *Oct. 31st*, 1904—10.30 o'clock a. m.

Met pursuant to adjournment.

Present: Commissioners Fleming, (chairman), Hamilton and Howard.

Present on behalf of the petitioner, Messrs. Hamilton & Colbert.

Present on behalf of the respondents, W. G. Johnson, Esq.

Whereupon, CHARLES H. SPENCER, a witness of lawful age, called by and on behalf of the petitioner, having been first duly sworn, is examined,

By Mr. HAMILTON:

Q. Will you state your occupation? A. I am resident engineer of the Baltimore & Ohio Railroad Company.

Q. Have you had anything to do with the terminal improvements? A. Yes, sir; I have charge of the construction here.

Q. Do you know anything about a plat that describes the land sought to be taken under condemnation in these proceedings? A. Yes, sir.

57 Q. By whom was that plat prepared? A. The plat itself was prepared by one of the draughtsmen in the chief engineer's office, from sketches furnished by my office.

Q. Furnished by your local Washington office? A. Yes, sir.

Q. And prepared from actual measurements? A. From actual surveys and measurements, on the ground, yes, sir.

Q. Are the lines contained in that plat accurate? A. Yes, sir.
Q. They include how much ground? A. 625 thousandths of an acre.
Q. How much is that in feet? A. 27,225 feet.

Cross-examination.

By Mr. JOHNSON:

Q. Are you familiar with the ground itself out there? A. Yes, sir.
Q. And the general surroundings? A. Yes, sir.
Q. On the diagram furnished here Third street is indicated as running from Brentwood avenue to New York avenue? A. Yes, sir.
Q. Was that an opened street? A. No, sir; it was not.
Q. It did not exist in fact? A. Across this corner (indi-
58 cating) was entirely closed—the corner in question here.
Q. I think you do not understand me. I asked you whether it was an opened street from Brentwood avenue to New York avenue? A. No, sir; that did not exist.
Q. What was there? A. There was a fill there, and there were some tracks in there which were operated by Mr. Daish, over a portion of this territory. There was no driveway through there.
Q. You do not know whether Third street was a recorded street or not? A. I do not.
Q. It was occupied, physically, by the tracks of Daish? A. For a portion of the distance.
Q. On this map there is a red line drawn from Delaware avenue towards New York avenue, marked a three per cent. curve? A. Yes, sir.
Q. What does that represent? A. That represents the center line of the proposed Washington branch, main tracks, at this point.
Q. Of what road? A. That is the center line between the Baltimore & Ohio and the Pennsylvania railroads.
Q. How far east of that red line is the easternmost part of the right of way for the Pennsylvania tracks? A. You mean to ask what we will require there?
59 Q. I presume that if this is the center line of anything the exterior line is fixed, is it not? A. It is fixed by the conditions we have got to meet on the ground, owing to cuts, fills and other circumstances.
Q. Do you know how much railroad is to lie east of that center line? A. Yes, sir.
Q. How much? A. There are two Pennsylvania tracks.
Q. Anything else? A. And the necessary slopes.
Q. And only two Pennsylvania tracks—no Baltimore & Ohio tracks east of that? A. Let me look at it to see whether this represents the center line between the Pennsylvania and the Baltimore & Ohio, or the center line of the Baltimore & Ohio. (The witness ex-

amines the plat.) It is the center line between the Pennsylvania and the Baltimore & Ohio tracks.

Q. There is to be a viaduct or some kind of a structure built in Delaware avenue and across Florida avenue; is there not? A. Yes, sir.

Q. What is the structure across Florida avenue to be; a bridge? A. Yes, sir.

Q. Will that carry all the tracks of every kind that come out of Delaware avenue? A. Yes, sir.

60 Q. I would like to know how far west from the easterly building line of Delaware avenue the face of that viaduct will be? A. It is 40 feet.

Q. Does it continue on that line until it gets to the north side of Florida avenue? A. Yes, sir. I made a misstatement a moment ago. I told you there would be two Pennsylvania tracks there. There are three. There are two main tracks and the siding.

Q. Will these three tracks be east of this red line? A. Yes, sir.

Q. Will there be anything else east of this red line? A. No, sir; nothing except the necessary slopes and ditches.

Q. I mean anything else in the way of tracks. A. No, sir; nothing in the way of tracks.

Q. And there will be three Pennsylvania tracks? A. Yes, sir.

Q. About how much space do they take up? A. There is 13 feet between the centers of the tracks. It is 6½ from the red line to the center of the first track, and then it takes 14 feet at least for the necessary ditches to the slope.

Q. From that red line east, how far will it go? A. It will be 46½ feet.

61 Q. So that the actual occupation by the railroad structure will be 46½ feet each of this red line? A. Yes, sir.

Q. That is right, is it? A. Yes, sir; excepting for the slopes that will be necessary.

Q. That would add something? A. Yes, sir.

Q. How far west of that red line will it extend? A. There will be 7 tracks west of that red line.

Q. Give us the distance, approximately, in feet. A. There will be 79½ feet to the center of the last track; and of course the matter of the necessary slopes on the other side.

Q. You are not going to stop at the center? A. We will, for clearance, add 8 feet more.

Q. About 90 feet more or less? A. Something of that kind; yes, sir.

Q. This plat seems to be made on the scale of 100 feet to the inch. A. Yes, sir.

Q. Have you a scale with you? A. I have.

Q. I would be glad if you will show us, upon this plat, the point west of this red line where the right of way will extent. A. You mean where the farthest track comes?

Q. Yes. A. It comes about here (indicating on the plat).

Q. Will you be good enough to tell me, approximately, how
62 far west of the west line of Brentwood avenue the occupation extends? A. You mean along Florida avenue, or at what point?

Q. Yes; along Florida avenue. A. I think it is about 15 feet west of the west side.

Q. How long have you had personal knowledge of the physical conditions out there? A. Since the first of July, 1903.

Q. Had any work been done in the neighborhood at that time? A. No, sir.

Q. So that it was in its usual condition? A. Yes; it was in its natural condition.

Q. Do you know how much above the existing grade of Florida avenue the railroad bed is to be? A. It varies from one to three feet.

Q. Above the existing grade? A. Above the old grade; yes, sir.

Q. How much is Florida avenue to be lowered? A. Florida avenue is lowered about 12 feet. We have 15 feet between the base of the rail and the new grade.

Q. 15 feet clear, above the track? A. No, sir; 15 feet from the base of rail. I understand that it will be in the neighborhood of 14 feet in the clear. I can give you the exact figures. You will have over 15 feet in the clear, and there is 2.6 feet over that, to the base of rail.

63 Q. After the road crosses Florida avenue does the bed dip to the surface, or does it continue elevated? A. The new grade is uniform along the main tracks.

Q. Practically level? A. No, sir; it is not level. It is on a grade of 95 one hundredths.

Q. Nearly 1 per cent.? A. Yes, sir.

Q. On this plat is indicated the proposed deflection of the Brentwood road from its present position to the eastward. You observe that? A. Yes, sir.

Q. Was that laid off under your direction? A. Yes, sir.

Q. Have you any personal knowledge of the physical situation which that proposed deflection covers? A. Yes, sir.

Q. What is the elevation of the land there, as compared with the elevation at the present Brentwood road? A. It is higher.

Q. How much higher? A. It varies along the length.

Q. I mean about how much? A. The present surface near Florida avenue, where this strip comes (indicating), is practically the same as the old grade of the Brentwood road; but the ground has been excavated there for some purpose or other, and that surface is about the same. After it gets out of that the ground is, I should judge, 6 feet higher.

64 Q. What ground has been excavated? A. Starting at a point on Florida avenue and running for about 100 feet, striking the Brentwood road at about 125 feet from Florida avenue.

Q. You mean that, in that area, there has been some excavation? A. Yes, sir.

Q. Recent? A. No, sir; it was before my time; but after we leave that point the ground is some six feet higher, I should judge, than the old Brentwood road. After we get out near the point where we intersect the old Brentwood road, the grade is not very much different—probably two or three feet.

Q. I notice on this plat a dimension between the red curved line of the railroad and the western line of the proposed deflected Brentwood road, marked "80." Does that mean that it is 80 feet from that curved line of track to the western line of the proposed Brentwood road? A. No, sir.

Q. Can you tell us how far it is from the proposed western line of the Brentwood road to the easternmost line of the railroad occupation? A. It is in the neighborhood of from 25 to 30 feet.

Q. And that western line of the proposed Brentwood road maintains a parallel from Florida avenue to the point where it intersects the existing Brentwood road, with the proposed railroad
65 structure; does it not? A. Yes, sir.

Q. So that would be the distance all along? A. Yes, sir.

Q. What, if any, provision have you made for the grading and improvement of the proposed Brentwood road? A. That is a matter entirely out of my hands.

Q. In whose hands is it? A. I only have to do with the construction and the matter of turning this grading over to me has not yet been done.

Q. I mean for the purpose of grading and improving the proposed road. A. I cannot make any provision for doing the construction work until we have something to do it on, and we have not got the property and have no authority to go ahead and make improvements on it. I have not been authorized to do anything of that kind.

Q. So that at the present time you have made no provision for that, that you know of? A. No, sir.

Q. And you are not able to tell us, therefore, what the grade of that road will be? A. I can tell you pretty near what it will have to be. I cannot give you the exact elevation at the two points without the plats in my office. Of course they will have to meet the grade at Florida avenue, and they will have to meet the grade at Brentwood road.

Q. You have not got those two elevations here? A. I
66 have not got them here; no, sir.

By Mr. GEORGE E. HAMILTON:

Q. You can supply them? A. Yes, sir; I could get them very soon.

Mr. JOHNSON: I do not care to bring him back here for that purpose, but I think it is important that we should have those grade points fixed.

By Mr. JOHNSON:

Q. Could you send a profile drawing here giving those figures? A. Yes, sir.

Mr. JOHNSON: That would be the most satisfactory way. Send us a little profile drawing, giving the necessary grade of the proposed Brentwood road from Florida avenue to the point of intersection with the existing Brentwood road.

The WITNESS: All right, sir.

Q. This plat does not indicate the proposed right of way beyond the point of its contact with the southerly line of New York avenue. Can you tell us where, as a matter of fact, this roadbed crosses the Brentwood road? Perhaps you can indicate it to the commission on the diagram filed with the amended answer. A. It will cross the Brentwood road at its intersection with the line of New York avenue extended.

Q. At about the point of New York avenue, 4th street, and the Brentwood road? A. Yes, sir.

67 Q. Where those three come together? A. Yes, sir; somewhere in that neighborhood.

By Mr. GEORGE E. HAMILTON:

Q. But above New York avenue? A. Yes, sir.

By Mr. JOHNSON:

Q. North of the northern line of New York avenue? A. Yes, sir.

Q. The road then continues easterly to the north line of New York avenue extended? A. Yes, sir.

Q. There is no such thing as New York avenue east of the Brentwood road, as a physical fact, is there? A. No, sir; not as a physical fact.

Q. So far as you know there is no recorded subdivision of it? A. No, sir.

Q. How is it west of the Brentwood road? Does New York avenue exist there as a physical fact? A. No; between the Brentwood road and Florida avenue it never has been in use; but I understand the street is platted and recorded.

Q. That is a matter of record. You do not know, of your own knowledge, about that. As a physical fact, there is no street laid out there in any way? A. Except that we are improving it there.

Q. What do you mean by improving; do you mean the

68 railroad structure? A. Yes.

Q. The law requires the construction of a bridge at that point? A. Yes.

Q And you cross New York avenue by bridge? A. Yes, sir.

Mr. GEORGE E. HAMILTON: Those lines have been given to us and designated.

By Mr. JOHNSON:

Q. Can you tell us, approximately, what will be the width of this roadbed at the point where it crosses Brentwood road, north of New York avenue—I mean of the whole roadbed of the Pennsylvania and Baltimore & Ohio tracks. A. There are about 141 feet of actual occupation.

Q. And for slopes, or something of that kind, it will probably be a little more? A. Yes, sir.

Q. Is it elevated or on grade at that point? A. At which point?

Q. Just where it crosses the Brentwood road. A. North of New York avenue?

Q. Yes. A. It will be very close to grade there.

Q. About how near? A. Within two or three feet. That is the grade of the street itself.

Q. Of the present Brentwood road? A. Yes, sir; in fact
69 it is graded across there. It is about three feet.

By Mr. GEORGE E. HAMILTON:

Q. What is the distance between the north line of New York avenue east of the Brentwood road, and the railroad occupation? A. There is an interval between our center line of 100 feet. Of course the slope line varies as we go up the hill.

By Mr. JOHNSON:

Q. Have you done any work at the intersection of the crossing of the Brentwood road, north of New York avenue, yet? A. Yes, sir.

Q. What have you done? A. It has been graded, and temporary tracks have been laid across there.

Q. Is that under your supervision? A. Yes, sir.

Q. Have you completed your office plans for that work, so far as there is anything to be done there? A. Yes, sir.

Q. What arrangement have you made there for crossing the tracks at the Brentwood road? A. We have not made any definite arrangement there.

Q. What kind of a crossing are you going to have? A. What do you mean?

Q. I mean to ask what kind of a crossing you are going to
70 have where your railroad crosses the Brentwood road, north of New York avenue? A. I do not see why there should be any crossing there. New York avenue is south of our tracks.

Q. I understood you to say that at the point where the railroad crosses the Brentwood road its roadbed would be about 3 feet above the present grade of the Brentwood road. A. Yes, sir.

Mr. GEORGE E. HAMILTON: North of New York avenue the Brentwood road is closed. There is no Brentwood road there.

Mr. JOHNSON: That is what I contended for downstairs, but the court ruled otherwise. I contended that the whole road is closed.

By Mr. JOHNSON:

Q. Let me continue my inquiry. I am not mistaken that the railroad occupation does cross the Brentwood road north of New York avenue at about three feet above its present grade? A. That is correct; yes, sir.

Q. What provision, if any, is to be made for carrying the Brentwood road across the railroad at that point? A. None. There will be no Brentwood road there.

Q. Why not? A. I understand it is closed, above New York avenue.

Mr. GEORGE E. HAMILTON: That is the very question that has been decided by the court, and for the purposes of this case
71 it has been fully decided. By the terms of the act of Congress the Brentwood road and other roads, streets and avenues are to be closed when the Baltimore & Ohio Railroad Company purchases, or acquires by purchase or condemnation the property on both sides of the road. North of New York avenue the company has acquired the property on both sides of the Brentwood road, and the terms and conditions imposed by the statute have been fulfilled. South of New York avenue the company has not acquired the property on both sides of the road, and does not intend to acquire it, so that according to the decision of Judge Gould the Brentwood road between New York avenue and Florida avenue has not been closed. That is the decision of the court, and until it is overruled it stands as the law in this case.

Mr. JOHNSON: There is no question about that, nor is there any question about it that the language of the statute applies to the whole road. The court has construed the provision in the statute as not being mandatory and holds that the road may be closed under certain conditions. I want to bring out what the situation is. As I understand it now, it is closed north of New York avenue, and the railroad company owns the property on both sides of it, and there is to be no crossing there.

Mr. Spencer, if you will be good enough to make that little rough profile drawing showing the grade of the proposed Brentwood road I do not think I will have to trouble you any further. I would also like to ask you to make for us a computation of the area of
72 that part of this ground which is proposed to be used as the Brentwood road.

By the CHAIRMAN:

Q. Can you tell us the grade there at the corner of the intersection of Florida avenue and the Brentwood road? You say the road is depressed there? A. Yes, sir.

Q. What is the cut there from the present level of the ground down to the roadbed at Florida avenue? A. It is about 15 feet.

Mr. JOHNSON: I understand the profile drawing he proposes to furnish us will give us the exact figures.

The WITNESS: Yes, sir.

By the CHAIRMAN:

Q. In other words, the bridge will be pretty near on a level. A. At the east side the bridge is pretty near on a level with the present ground.

Q. And the street will be depressed so that vehicles can pass under it? A. Yes, sir.

The commission thereupon adjourned until Monday, November 7th, 1904, at 10.30 o'clock a. m.

(Here follow diagrams, Exhibit No. 1 and Exhibit No. 2, marked p. 73 and p. 74.)

Filed November 21, 1904.

WASHINGTON, D. C., *November* 7, 1904—10.30 o'clock a. m.

Met pursuant to adjournment.

Present: Commissioners Fleming (chairman), Hamilton and Howard.

Present on behalf of the petitioner: Messrs. Hamilton & Colbert.

Present on behalf of the respondents: W. G. Johnson, Esq.

Whereupon CHARLES H. SPENCER resumed the stand for further examination.

By Mr. HAMILTON:

Q. Mr. Spencer, you were requested to bring a profile showing certain measurements at Florida avenue. Have you done so? A. Yes, sir.

Q. Is that the paper (indicating)? A. That is the paper.

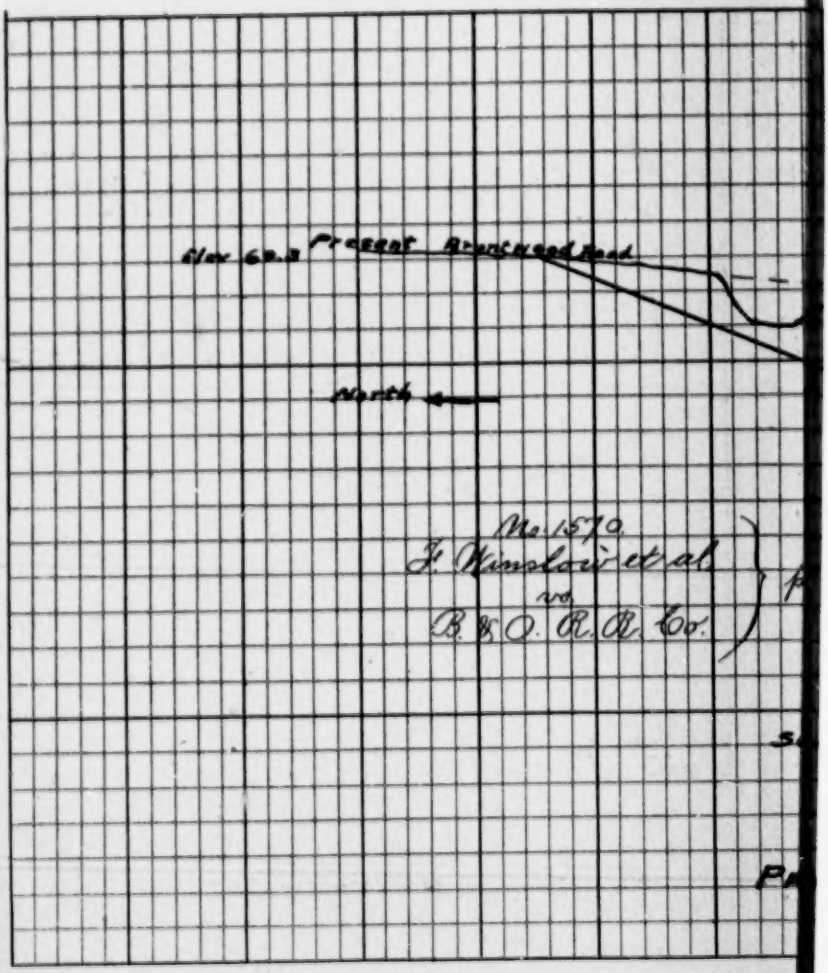
The paper referred to was offered in evidence, and marked "Exhibit No. 1."

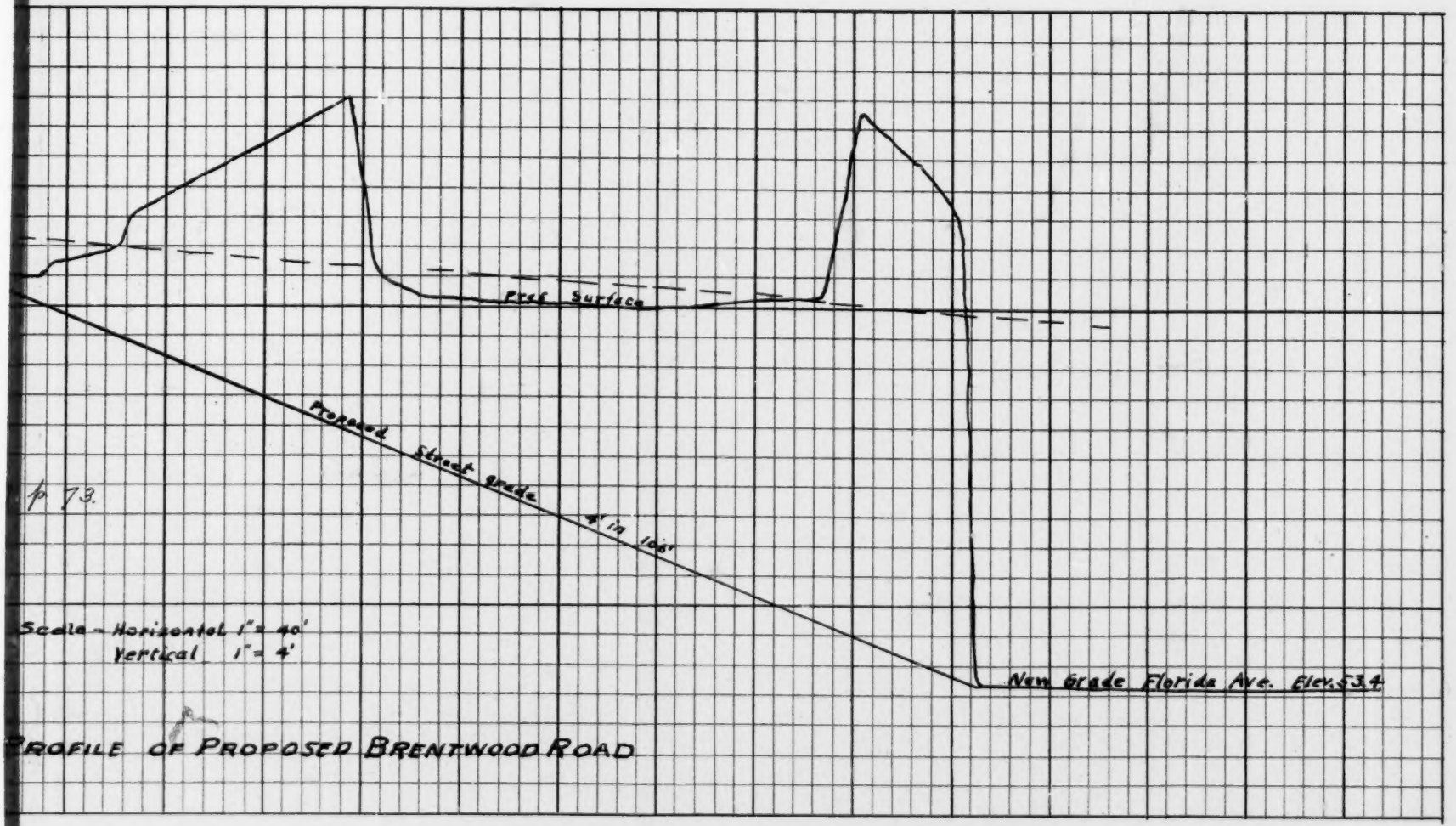
By Mr. JOHNSON:

Q. I notice on this Exhibit No. 1, Mr. Spencer, that at the southern end of the profile you have marked "New grade." As I understand it, that will be the connection between the proposed
76 deflected Brentwood road and Florida avenue? A. Yes, sir.

Q. Then at the northern end of it you have, "Present Brentwood road." That will be the point where it will connect with the existing Brentwood road. Is that correct? A. Yes, sir.

EXHIBIT No. 1.


Elev 62.3
Present Brentwood Road
North
No. 1570.
F. Kinsloe et al
vs
B & O. R. R. Co.

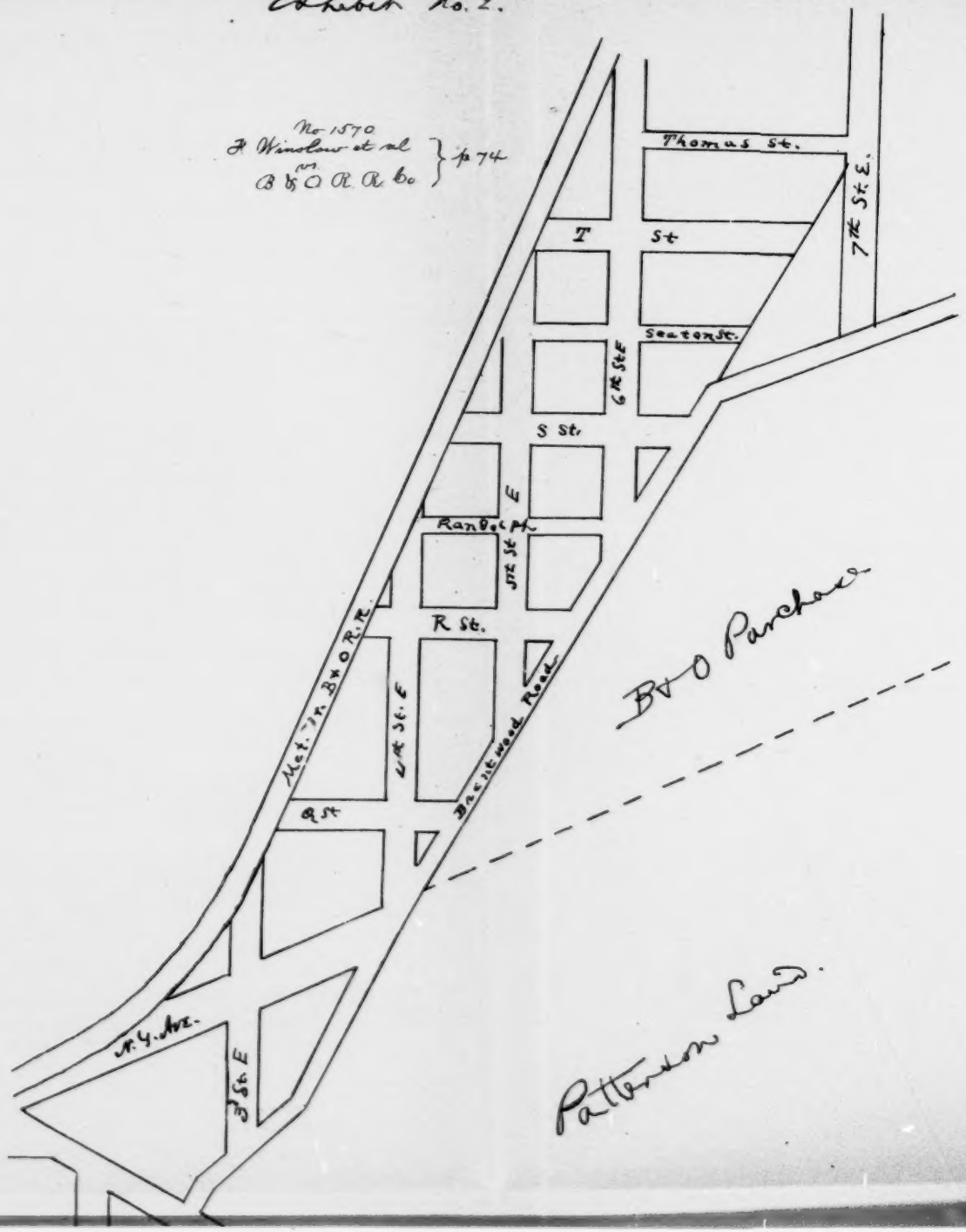


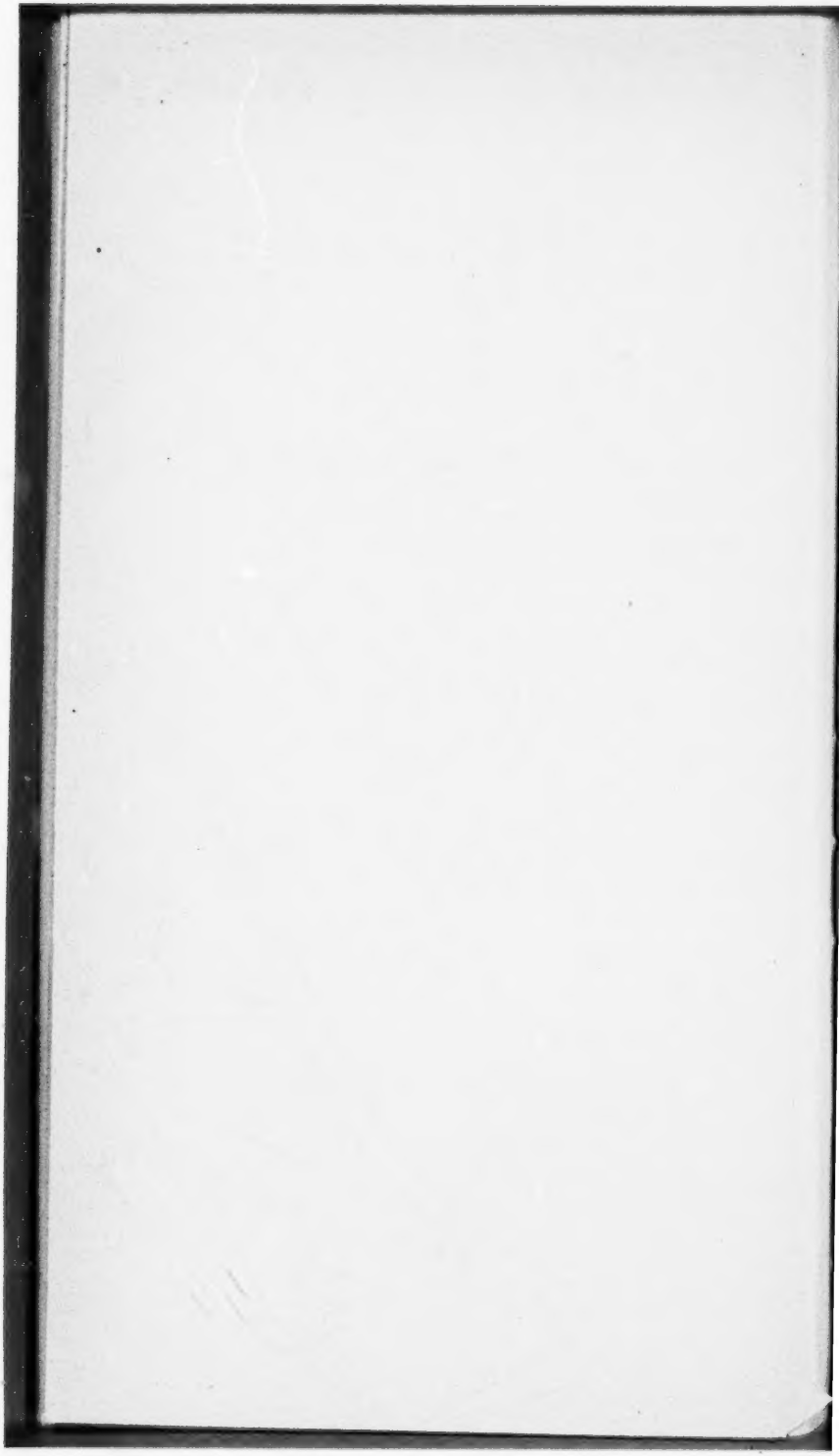
p 73.

Scale - Horizontal 1" = 40'
Vertical 1" = 4'

PROFILE OF PROPOSED BRENTWOOD ROAD

Exhibit No. 2.


No 1570
A Winslow et al
B & O R R Co
} p 74
Thomas St.
T St
7th St E.
Seaton St.
6th St E
S St.
5th St E
Randolph
R St.
4th St E
Q St
Bladensburg Road
Met. Jn. B & O R.R.
B & O Parcel
N. Y. Ave.
3rd St E
Patterson Land.



Q. And the red line, marked "Proposed street grade" indicates the slope of the new road? A. Perhaps I should make an explanation. As I stated in my testimony, I believe, nothing has been done toward establishing any grade. I intended indicating there what might be done, not what will be done.

Q. I understand that. The southerly extreme of that red line does indicate the grade which Florida avenue has to have? A. Yes, sir.

Q. And the northerly end indicates contact with the present Brentwood road? A. Yes, sir.

Q. This wavy black line represents the surface of the Patterson land, through which this road goes? A. Yes, sir; that is taken on the center line of the proposed road.

Q. You have quite a depression here marked "Present surface." Is that the depression to which you referred in your testimony as indicating that there had been some excavation? A. Yes, sir.

77 By Mr. HAMILTON:

Q. Mr. Spencer, it is stated in the petition in this cause that it is desirable to straighten Brentwood road as indicated on this plat rather than carry it along the old line. Why is it so? A. Our tracks and masonry will cover the portion of this triangle from the red line to the pencil point that I have placed on that map—the prolongation of this white terminal line. This profile shows on Florida avenue a cut from the top of our roadway of about 17 feet. That 17 feet will require slopes of 1½ to 1, which are absolutely essential, a distance of 25½ feet more, which carries us out very close to the red line, as indicated on this plat.

Q. That is the red line marking the difference between the Brentwood road and the triangle taken for the railroad purposes? A. Yes, sir.

Q. Is there any condition on Florida avenue where Brentwood road now is, and extending eastward, that makes it necessary? A. It is all full of tracks in there.

Q. And there is a bridge there for carrying the tracks? A. There is a bridge there. It would be necessary to get down to Florida avenue.

Mr. JOHNSON: You mean there will be, Mr. Hamilton?

Mr. HAMILTON: Yes, under the plans of the terminal company.

Mr. JOHNSON: Not that it has been there heretofore?

78 Mr. HAMILTON: Oh, no.

By Mr. HAMILTON:

Q. That triangle (indicating) is necessary for railroad purposes, and has become so as you have just stated, because of the slopes and the occupation you have spoken of? A. Yes, sir.

By Mr. JOHNSON:

Q. Mr. Spencer, I understood from your testimony the other day that the railroad occupation, for its tracks, would come approximately about 30 feet west of the westerly line of the proposed relocated road. Is that right? A. Yes, sir; in that neighborhood.

Q. Did that include the foot of the slopes, or the top? A. No, sir; that did not. That was the railroad track occupation.

Q. How far east of that will the foot of the slopes be? A. At Florida avenue?

Q. Yes. A. 25½ feet.

Q. So that it will be within five feet of the westerly line of the new road? A. Yes, sir.

Q. And that, as I understand you, continues on a parallel along the whole line of the deflected road? A. No, sir; the slope
79 does not continue along the whole line at that point.

Q. For how long a distance? A. It will vary as it goes up this way slightly (indicating).

Q. What is the farthest away from the west line that it will occupy? A. There will be a point in here somewhere (indicating) I expect, about 25 feet away.

Q. But the point of about 30 feet, which represents the roadbed itself, is parallel to this western line? A. Yes, sir.

Q. So that the greatest distance from the western line to the roadbed itself will be 30 feet? A. Yes, sir.

Q. And the slopes will vary according to the grade? A. Yes, sir.

Q. While you are here I want to show you a diagram taken from Hopkins' atlas. It does not profess to be accurate as to scale or anything like that. I want to ask you if that correctly represents the area between Florida avenue and Seventh street east, and the Metropolitan branch of the B. & O. railroad, as you remember it? A. Yes, sir; I should say practically so.

Q. You told us at the last session that Brentwood road was closed at a point here, approximately—the northerly line of New York avenue? A. Yes, sir.

80 Q. From there up to Seventh street? A. Yes, sir.

Q. What is the fact with respect to all these other streets in here? Are they not all closed except New York avenue? A. New York avenue and T street.

Q. T street you have not closed? A. No, sir.

Q. And Brentwood road from the north line of New York avenue down—you do not propose to close that? A. No, sir.

Q. But all the rest of it is closed except T street. Is that right? A. I can see nothing else there but what is closed.

Mr. JOHNSON: I offer that diagram in evidence.

The paper referred to is marked "Exhibit No. 2."

By Mr. HAMILTON:

Q. Mr. Spencer, were those streets shown in that portion of Ecking-

ton subdivision just submitted to you, open or not? A. You mean to occupation?

Q. Yes. A. No, sir; not all of them.

Q. Do you remember which were? A. Fourth street from R street to the Metropolitan tracks was paved. There were no buildings.

Q. Just street we are talking about now? A. R street was opened.

81 By Mr. JOHNSON:

Q. R street was improved, was it not—paved? A. Yes, sir. Randolph street from Fifth street west; Fifth street: Sixth street; S street; Seaton street from Sixth street west; T street; and Thomas street from Sixth street to Seventh. Also Brentwood road.

Testimony on Behalf of the Respondents.

Mr. JOHNSON: Gentlemen, I have brought here the award in the Daish condemnation, in 606, which I will submit, and from which you will see that for the 47,139.12 square feet, the Daish property immediately opposite this at Florida avenue and Brentwood road, the award was $1.55 per square foot for the land alone.

Mr. HAMILTON: I want to note an objection to that as not being competent testimony to influence the verdict of the jury in this particular case.

Mr. JOHNSON: Have you anything from which we can get the area of the B. & O. purchase of the Patterson property?

Mr. HAMILTON: Yes; I will supply it to you.

Mr. JOHNSON: The consideration in the deed, which we did not know the other day, is $297,585.74, but the deed does not specify the quantity of land.

Mr. HAMILTON: I can supply the data from my books. My recollection was, as I stated, that it was 53, but it may have been 55, as Mr. Johnson recollects it. It was either one or the other.

82 JESSE H. HEISKELL, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined,

By Mr. JOHNSON:

Q. Mr. Heiskell I suppose these gentlemen know that you are in the real estate business. A. I am personally acquainted with all the gentlemen.

Q. I suppose for the purposes of the record you had better state how long you have been engaged in that business? A. Nearly 18 years.

Q. And what class of property you have handled? A. We have sold property generally throughout the District of Columbia, and in Washington.

Q. Outside the city limits as well as inside? A. Inside and outside.

Q. Do you know the property proposed to be taken in this condemnation proceeding by the Baltimore & Ohio railroad? A. I understand it to be this triangular piece shown by this map, at the intersection of Florida avenue and the former Brentwood road.

Q. Yes; the question is do you know the property? A. I do; yes.

Q. Were you familiar with the general situation around there prior to the railroad activities? A. I was; yes, sir.

Q. You have seen the ground and know its general appear-
83 ance? A. I have; yes.

Q. Did you ever have any occasion to use the Brentwood road? A. Yes; I have driven over it frequently.

Q. Can you give us any idea where you could go by that road? A. We used to go to Ivy City. That used to be a very popular resort about 20 years ago when I first used it, out through that section of the country there beyond Ivy City. It was a great thoroughfare at that time to the race course, which used to be there, and the old fair ground.

Q. That has not been its use since the race course was abandoned? A. Oh no; but for that section of the country out there beyond.

Q. Do you know any other place to which it led as a thoroughfare? A. Well, you could go through there as a short cut in going out towards Hyattsville, and going on to the subdivisions beyond there.

Q. Have you been over it enough to say whether it was a road much traveled or not? A. I never used it much beyond Ivy City and the brickyards that were there.

Q. That is the limit of your knowledge of its use? A. That is the chief use or travel that I had on it.

Q. I wish you would look at Exhibit No. 1, which is a plat
84 showing the proposed grade of the new deflected part of this road, which was produced here by Mr. Spencer. I wish you to look at that in connection with the plat filed with the instrument of appropriation, on which you will see indicated a strip 50 feet wide, being the east 50 feet of the subject of condemnation, which is the proposed deflection of Brentwood road. Have you examined it? A. Yes, sir.

Q. You understand it, do you? A. I do.

Q. It is also in evidence here that the Brentwood road, from along the line of New York avenue, which is the northern boundary of the Patterson tract, is closed. Taking those facts into consideration, I would like you to state what in your opinion would be the advantage, if any, of the new deflected Brentwood road over the existing Brentwood road, before there was any railroad occupation or right of occupation there? A. There would be no advantage at all in deflecting the road. It simply carries the point of entry farther

from the city; and the grade seems to increase from Florida avenue north.

Q. What, in your opinion, is the most valuable part of that Patterson tract? A. I think this corner here, the subject of condemnation, is.

Q. I wish you would state now, what in your opinion is the value of that land proposed to be taken? A. Do you mean this strip here?

85 Q. No; I mean the whole piece proposed to be taken? A. I value that property at $1.50 a foot. I would state in that connection that I have had occasion to investigate the values of property recently around the intersection of Florida avenue, New York avenue and Eckington place. I have property on Eckington place for sale opposite the present freight depot, at $1.50 a foot.

Mr. HAMILTON: I object to what the holding price of property is as showing evidence of values.

Mr. JOHNSON: I do not ask him to state the holding price.

Mr. HAMILTON: He did not say he had sold it at $1.50. He said he was holding it at that.

The WITNESS: Yes; at $1.50 a foot.

By Mr. JOHNSON:

Q. I did not mean to ask the holding price. I thought he was stating he had property there as indicating a knowledge of the value of property in the neighborhood. A. I say, we have property there.

Q. I do not care what you hold it at. A. There is very little ground of this character, of this proximity to the freight terminals here, that can be had, in my investigation, at less than $1.50 a foot for a corner of economical dimensions.

Q. Which is the most valuable frontage of this Patterson property? A. In the small piece of property under consideration here?

86 Q. The track, you observe, has but two frontages, the Brentwood road and Florida avenue. Of those two which is the more valuable? A. I consider the Brentwood road the more valuable frontage there.

Q. Are you accustomed to using roads leading in and out of the city—what might be styled country roads? A. I do, a good deal.

Q. In what way? A. For driving.

Q. What in your opinion would be the utility of a road having a grade such as this is supposed to have, and a railroad track or a series of railroad tracks to accommodate the entire railroad traffic to and through the city of Washington, within 30 feet of the edge of the road, the road being 50 feet wide? A. In my opinion the road would be practically useless. It would be very dangerous to drive upon. If I understand the situation, the combined tracks of the two roads would come down this elevation or viaduct. I think it is earth beyond Florida avenue. Anyway it would be elevated there,

and that close proximity would certainly be dangerous driving there, unless you had a very gentle horse. I should think it would be practically useless as a thoroughfare. If I understand, it will be closed anyway north of New York avenue, so that it is what we would term a blind street or roadway.

87 Mr. JOHNSON: Mr. Hamilton, I suppose it is conceded that New York avenue is not open east of the Brentwood road?

Mr. HAMILTON: At present?

Mr. JOHNSON: Yes.

Mr. HAMILTON: Certainly.

By Mr. JOHNSON:

Q. Do you remember, Mr. Heiskell, where New York avenue strikes Florida avenue; at what point? A. At about the intersection of First street.

Q. First street east or west? A. First street east.

Mr. HAMILTON: New York avenue, at First street?

A. I think so, Mr. Hamilton. That is where it crosses Florida avenue.

By Mr. JOHNSON:

Q. I am speaking about Florida avenue. You say about First street east? A. Yes, sir; just beyond First street.

Q. I would like you to state, Mr. Heiskell, if you can, what in your judgment would be the damage to this Patterson land of taking the piece proposed to be taken in this condemnation, and utilizing it for the purposes and in the manner stated? A. I think the damage to the entire tract would be considerable. The placing of the combined terminals of the Pennsylvania and the B. & O. roads in this close proximity to this property, would of course in-

88 jure this entire frontage on the Brentwood road for building purposes, and the taking of this piece of property I suppose if a portion of carrying out the general scheme. I consider it would be an injury to the entire tract of certainly 20 to 25 per cent.

Q. Twenty to twenty-five per cent. of what? A. Of its value.

Cross-examination.

By Mr. HAMILTON:

Q. Mr. Heiskell, you were the owner of a part of square 711, condemned by the Baltimore & Ohio railroad recently, were you not? A. I was; yes, sir.

Q. You testified in that case? A. I did.

Q. Do you remember your testimony in that case as to values? A. I do.

Q. What was it? A. I testified the land there was worth about $2 a foot.

Q. Do you recall what was given for it? A. $1.40 for some and 72 cents for others. I still maintain, though, it is worth $2 a foot—cheap.

Q. I am asking what your testimony was and what was the appraisement. Have you had many sales of property in this
89 locality recently? A. In this immediate locality?

Q. Yes. A. No; I sold Mr. MacDowell a small piece of inside property, through Mr. Turpin, about a month ago, coupled with the proviso that he should open an alley to Florida avenue, which would give the free use of it, for 75 cents a foot. It was rear ground, fronting on no street at all.

Q. But available for warehouse purposes? A. Only in connection with his use.

Q. Well, he is a warehouseman? A. Yes, sir.

Q. That was on the west side of the railroad improvements, was it not, Mr. Heiskell? A. Yes; that was in the rear of Eckington place.

Q. Have you had any other sales in that neighborhood? A. No; not in this immediate neighborhood.

Q. Or have you had any knowledge of prices in that neighborhood? A. Yes.

Q. Of sales I mean—not hearsay, but actual knowledge? A. No, not any immediate sales there.

Q. Do you know of any property north of Florida avenue within the vicinity of this work, either on the east side or on the west side, that has sold for $1.50 a foot?

Mr. JOHNSON: You mean the east or the west side of what?

Mr. HAMILTON: Of the B. & O. work?

A. Yes; the Daish property was sold for more than that.

90 Q. Was the Daish property sold? A. Well, it was condemned. It was valued at that.

Q. Is that the only property you know of? A. That is the only one at $1.50 a foot that I know of, immediately there.

Q. Do you know of any property that has sold for $1.25 a foot? A. We have been offered $1.25 a foot for inside ground on Eckington place.

Q. Those are paved streets? A. Eckington place is paved.

Q. And on the west side of the works. A. Yes.

Q. In your opinion which is the more valuable property, that on the west side or that on the east side of these improvements, as a general proposition? A. Well, without the opportunity of getting switching facilities, I would say there is a very small, difference in value, if any. There might be a slight preference on the west side, but as I stated before, there is little or no ground there that can be had.

Q. Do you know how much Barber & Ross paid for their ground? A. I do not exactly. I did know; but that is a considerable distance out, and it was bought a long time ago.

Q. In giving your testimony as to values, you know of
91 course that the property being condemned is a part of a large tract? A. Yes; I know it is a part of the Patterson tract.

Q. Unsubdivided, and with no paved streets except Florida avenue? A. I do.

Q. The tract of land contains, I suppose, from 60 to 70 acres or more.

Commissioner HAMILTON: I think there were 145 acres in the whole tract.

By Mr. HAMILTON:

Q. In giving your testimony as to value, did you exclude the effect in regard to any increase of value by reason of the construction of the terminal? A. I think the construction of the terminal is an injury to this property.

Q. You think it is? A. I do.

Q. And what is your idea of the value of this property in February 1903? A. In February, 1903?

Q. Yes, before the terminal act was passed? A. The value of the property was substantially the same, with the exception that there has been more property absorbed since, and there is less supply on the market around these points. The absorption of property would increase the demand for a corner situated as that is.

Q. You have said that the opening of Brentwood road or the transferring of Brentwood road, did not benefit, but in your
92 opinion was a detriment to this property. A. I did.

Q. Was that testimony given with the recollection that the terminal improvements would be where they were, without reference to the change in the road? A. Would the improvements be where they were without reference to the change in the road?

Q. Yes; if there was no road made there, the improvements would still be there, or the terminal works of the B. & O. railroad, whatever you choose to call them, would still be there. A. I understand the proximity of the terminal tracks here to this road, would render the road practically useless as a thoroughfare. The bringing of this road where it now deflects, is of no benefit whatever. It opens up a matter of egress and ingress here for a short distance (indicating), a passageway or an alley, but I maintain it is not a practicable street for any general utility.

Q. Suppose the road was not changed, but the terminal works remained as fixed by law; what would be the condition there as to values?

Mr. JOHNSON: Do you mean, Mr. Hamilton, if the terminal works remain as fixed by law now, or as they were formerly?

Mr. HAMILTON: As fixed by the law of 1903, but simply obliterating the idea of any road. I ask him what effect that would have upon his opinion as to the present value of the property.

A. In other words, you mean not to deflect the road at
93 all?

Q. Yes. A. To leave the road as it was originally?

Q. Yes. A. I think the property would be under that condition just as valuable or more valuable than it is now.

Q. Why more valuable than it is now? A. You would have a longer frontage here, to begin with, and you would reach it at an easier grade.

Q. Under the adverse conditions that you assume to exist because of the building of the terminals, would the frontage on that terminal be of any benefit? A. As a business proposition, with regard to this triangular piece of property, it would not be any serious detriment. As to the property itself, my reference to the damage that would be done by this, is to the entire tract; not the property that would be taken, but to the property that would remain.

Q. In either case, as to the property that remains or as to the property that is taken, what would be the effect if you obliterate the road and have the tract binding upon the works of the company as fixed by law? A. I think the value of the property would be, as I stated before, $1.50 a foot around that point.

Q. If corner lots located south of Florida avenue, almost opposite the property that you have there, had been sold within the last six
months for less than $1 a foot, would that affect your view at
94 all? A. No; I think it is cheap property.

Q. Do you know of any property south of Florida avenue in that locality having sold recently for $1.50 a foot? A. No; I stated awhile ago that I do not; but I canvassed the area there in the last month or two in quest of property for a client, and was unable to find anything desirable for less than $1.50.

Q. Mr. Stellwagen testified to several sales made recently for less than $1, some at $1.25, and in that neighborhood. Would that fact affect your view at all as to values? A. Not at all. People frequently sell property for less than it is worth.

Q. In regard to the MacDowell property that was purchased. Did he not already own property on both sides of that lot that you sold him? A. He did; yes.

Q. And he had to have this to carry on his business? A. That is the way I understood the situation exactly.

Q. That property you say sold for how much? A. We sold him that property for 75 cents a foot, on condition that he open up an alley out to Florida avenue, which would supply that property in the rear.

By the CHAIRMAN:

Q. Mr. Heiskell, in stating that this property had depreciated in value about 25 per cent., do you take into consideration the
95 cut of 12 or 14 feet here? A. I understood there would be, Colonel—that there would be a cut here (indicating), and this ground rises from Brentwood road back?

Q. In other words, Florida avenue is depressed, and of course Brentwood road would have the same grade? A. Yes. That was with reference to the whole tract, the property that would be left remaining there.

JOHN B. DAISH, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined.

By Mr. JOHNSON:

Q. Mr. Daish, you are a member of the bar of this District, I believe? A. Yes, sir.

Q. And you have been for some years? A. Some four years; yes, sir.

Q. Have you been engaged in any other business? A. Since 1889 I have been president of the corporation of S. S. Daish & Sons, and am yet.

Q. What was the business of that company? A. The handling of hay, grain, coal and similar commodities.

Q. Was the business a large one or a small one? A. It was a very large tonnage.

96 Q. How much average a year? A. The coal business aggregated about an average per year of 60,000 tons. The other business was probably as large, if not larger—probably another 60,000 tons,—making in all probably 125,000 to 150,000 tons a year, varying somewhat with the years and the Government contracts which we happened to have, and so forth.

Q. Did that company occupy any land in the neighborhood of the property proposed to be taken for that business? A. From 1894 until October of last year we occupied land in the neighborhood of Florida avenue and Brentwood road, being at the northwest corner of those two highways. In the beginning we occupied only lot one, which was 50 feet frontage on Florida avenue, and subsequently we occupied back on Third street and farther west on Florida avenue, making a total of about 47,000 feet. That was described as lots 19, 20, 21, and 22 of block one, of Eckington.

Q. Looking at this plat attached to the instrument of condemnation, you will observe a piece of ground bounded by Florida avenue on the south, Brentwood road on the east, and Third street on the northeast. A. I see the piece to which you refer; yes, sir.

Q. Is that the site of your occupation? Was it in that piece of ground? A. That was the piece of ground; yes, sir, immediately opposite the southwest corner of the Patterson tract, so-called.

97 Q. So that your occupation included that corner bounded by Florida avenue and Brentwood road and Third street. A. Yes, sir.

Q. You say you were there in 1894? A. We first moved there in 1894. We bought the property in June and occupied it in October, I think.

Q. How much time did you spend there? A. From 1894 until

the latter part of 1897 or 1898 I was there every business day; since that time probably an average of three times a week until October, 1903.

Q. And this part of the period that you were there three times a week, how much time would you spend there? A. Sometimes it would be an hour, sometimes it would be all day, sometimes half a day. It varied considerably.

Q. Was it a matter of hours or of minutes? A. It was a matter of hours, invariably.

Q. State whether or not you observed anything about the traffic or travel on Brentwood road and on Florida avenue at that neighborhood, independently of your own?

Mr. HAMILTON: I object to that as irrelevant to the inquiry.

A. Independent of our own teams, Florida avenue—taking that first—for some years has been the most traveled east and west thoroughfare north of H street, H street and Florida avenue carrying the bulk of the east and west traffic north of East Capitol street. I refer in that connection not only to business teams going past the place we then occupied,—I am not at all referring to our own
98 teams or our own customers' teams—not only to teams hauling various articles of merchandise, but it was considerable of a driveway for people driving out for pleasure in the afternoon. Brentwood road was used considerably, but not quite as much as Florida avenue. There was and I believe is a large number of market gardeners to the north who came down Brentwood road with their products, and other traffic commencing on the Brentwood road as early as half past 3 or 4 o'clock in the morning. I have spent some nights there, and know that about that time teams commence to move into market, and then they would go back on market nights as late as 10 o'clock. During the day there was a good deal of driving there, particularly in the afternoon.

Q. Did you ever drive out that road? A. Many times.

Q. That was subsequent to 1894? A. Since 1894; yes, sir.

Q. Do you know whether the Ivy City race-track was running at that time? A. I think not. I think the Ivy City race-track——

Q. Was that your objective point in any of your rides? A. I had sometimes to go to Ivy City, sometimes to Langdon, and occasionally to Bladensburgh and Hyattsville.

Q. Did you drive out the road much? A. Quite frequently; yes, when business carried me to those places.

Q. What did you observe as to that road being used at all as a thoroughfare by persons for driving? A. There was a great
99 deal of driving over Brentwood road and into Queen's Chapel road, which comes out, as we all know, or has an exit, at Fifteenth street. There is no way of getting back into that country except 12th street for a short distance, between the old toll-gate, 15th and H, and the Brentwood road.

Q. What sort of driving did you see? A. There was plenty of it

country teams, people out for pleasure, some people on business, drummers' buggies, &c.

Q. Did you ever observe any driving of people in the city for pleasure? A. A great deal of driving. President McKinley frequently drove out there.

Q. What in your opinion is the value of the parcel of land proposed to be taken in this condemnation? I mean the entire parcel.

Mr. HAMILTON: I object, because the witness has not qualified himself to give expert testimony as to values of property.

By Mr. JOHNSON:

Q. Have you had any occasion to buy or sell real estate? A. I conducted negotiations for this property which we occupied, and I have bought some city property.

By Mr. HAMILTON:

Q. For your own use? A. Yes, sir.

By Mr. JOHNSON:

100 Q. When you were negotiating for the purchase of this property, did you inquire into the values of other property except that? A. We inquired into other values, yes, closer to the Capitol. We inquired into some values on Delaware avenue, and also at some places on the Pennsylvania railroad, and other places, when we were looking for a location.

Q. Did you ever sell any property? A. Except the property taken for condemnation, I do not think I ever did. I think I own all I ever bought.

Q. That was not sold voluntarily? A. Not voluntarily no, sir.

Q. Do you use any property anywhere else but there? A. Did we?

Q. Yes. A. We used property at the corner of North Capitol and D street, prior to moving there.

Q. Did you own that or rent it? A. That was leased.

Q. After this property was condemned and you gave up possession of it, did you go out of business, or did you locate somewhere else? A. We rented temporary quarters in Georgetown until July of the present year, but we did not own it.

Q. Did you get any property in July? A. No business property. I bought some residence property.

101 Q. When you were endeavoring to locate elsewhere, did you make inquiries about the values of property? A. I made some inquiries concerning the value of property for this purpose on the request of other people, but not for myself.

Q. You mean as the agent for others seeking to purchase? A. As the agent, yes sir—not as a real estate agent, but simply coming to me in a professional way and asking me if I knew where property could be had, and at what price. I might say I have also been so-

licited to purchase property in the division of Eckington west of the Metropolitan branch.

Q. You mean by brokers? A. By brokers; yes, sir.

Q. I would like you to state what in your opinion is the value of this land?

Mr. HAMILTON: I object. He has not been qualified, as an expert dealer in real estate, to testify as to values.

After discussion, the question was withdrawn.

By Mr. JOHNSON:

Q. Mr. Daish, it is in evidence in this case now, that the Brentwood road is closed from the northerly line of New York avenue out—from that point north, and that this proposed deflection of the street would give a road 50 feet wide with a grade such as indicated upon Exhibit No. 1, Mr. Spencer's profile of the proposed road,
102 showing the difference between the existing grade of Florida avenue, and the new grade. It is also in evidence from Mr. Spencer that the actual roadbed over which trains will pass will run parallel with the west line of that proposed new road, 30 feet distant from it, and the slopes reaching within from 25 to 5 feet of it. Taking those facts into consideration, what in your opinion would be the utility of that proposed new road as a roadway? A. In the first place, Brentwood road would become a cul-de-sac, a blind street. In the second place it would change the grade materially here (indicating), making it four feet to the hundred. It would make it as heavy a grade as is usually allowed on railroads when they approach a coal dump. Four feet in a hundred is a very stiff grade, too stiff for very heavy hauling. Those two features would naturally be very objectionable to anyone who owns property or who is adjacent to it.

Q. What would be the effect of having the railroad bed or tracks paralleling the road along its own distance, within thirty feet of it? A. With the number of trains that would be going over there, it would be a serious objection to anyone nearby.

Q. I am speaking now about simply using the road. A. There are three reasons why you could not use the road. In the first place, it has no outlet. In the second place, it is a remarkable steep grade. In the third place, the presence of the trains would prevent its use if it were opened and had a proper grade—would
103 largely prevent its use on account of the engines and trains of cars passing by.

Q. You have spoken about your driving. Have you driven in the neighborhood of railroads? A. Frequently. I did yesterday.

Q. I want to know whether that has been a matter of any extended experience, your driving in the neighborhood of steam railroads? A. Yes; every time I drive I have to drive somewhere near a railroad as a matter of business.

Q. Have you observed others driving? A. I have.

Q. Which is the less objectionable in the use of a road, to drive under a bridge or to drive along parallel to it within thirty feet of it? A. The less of the two evils would be driving under the bridge.

Q. What in your opinion would be the damage to this land from this proposed condition of deflecting the road and putting the rail-road in front of the road within 30 feet?

Mr. HAMILTON: I object on the ground that the witness has not shown any qualifications to testify as to what would be the original value of the land or any question connected with it.

Mr. JOHNSON: I insist that that is a proper question, and I leave it to the commission to decide.

The CHAIRMAN: The commission will permit the question. You may answer.

104 The WITNESS: The question, as I understand it, is the relative damage to the entire tract by virtue of the deflection, so-called, of the Brentwood road, the change of grade of that part which is deflected, and the presence of the tracks within 30 feet from the westerly side of the road?

By Mr. JOHNSON:

Q. Not within it, but at approximately 30 feet. A. I should say that the value of the entire tract would be depreciated by 25 per cent. of its value. The westerly portion of it would be affected more, and the easterly portion not as much as the westerly, of course, being at a distance from the tracks and the roadway.

Cross-examination.

By Mr. HAMILTON:

Q. Mr. Daish, you say the value would be decreased by 25 per cent.? A. Yes, sir.

Q. Are you looking at this as farming land? A. No; I am not looking at it as farming land. It has been used for a pasture, I believe.

Q. Well, pasturage is a farming use? A. Even as farming land it would be depreciated some.

Q. How much? It is farming land now? It is used for pasturage, and not subdivided at all, is it? A. No.

Q. How much would it be? A. Strictly as farming land I
105 should suppose ten per cent.

Q. And how far back from Brentwood road would that injury go as farming land? A. Probably 500 or 600 feet.

Q. After that it would not be depreciated at all, would it? A. It would be depreciated some. You have got your fire risk in the case of crops. In the case of using it for pasture land, as it is now used, people would not put a spirited horse in there.

Q. As farming land it has its front on Florida avenue, has it not? A. Oh, yes.

Q. And if used for any other purpose, of course streets would have to be run through—that is, if used for building purposes, or lots? A. It would have to be subdivided.

Q. And the damage would only be to such lots as would front or abut upon Brentwood road, would it not? A. Oh, no; not at all in my judgment. The smoke from the engines would go further than across fifty feet.

Q. We are talking about the effect of the condemnation and not the effect of the smoke of the engines. The smoke of the engines would be there whether Brentwood road is straightened or not. A. The question as I understood it, and which I repeated, was as to the effect upon the Patterson tract by virtue of the deflection of
106 the Brentwood road, the presence of the tracks, and the slope of 30 feet.

Q. I did not understand that to be the question; but your depreciation is caused by the construction of the terminal works there—— A. As I stated the proposition when I repeated the question.

Q. Now, suppose that the terminal works were constructed there and Brentwood road were left just as it is, not deflected; what would be the difference between that situation and the one with the road deflected? A. As to the effect upon the entire tract?

Q. Yes, sir; that is the only testimony you have given. A. There would be a certain depreciation by virtue of the presence of the road, increasing in extent or in quantity from the east to the west. The closer you get to the railroad track the greater would be the injury.

Q. Would it not be a fact that if this condemnation proceeding did not take place, and Brentwood road remained where it is, that the property would still abut right up on the terminal construction? A. That is quite true.

Q. In regard to the rest, would there be any difference in that situation than there will be in the situation that is created by this condemnation? A. No; if you are only going to do one thing, put the tracks down, that is an element of the first answer given.
107 Q. Would it not be improved over the condition that would exist if the construction was put there and no road carried down as a buffer between the land and the terminal improvements? Is it not improved by reason of the placing of that road there? A. I do not think the opening of that road improves the property at all.

Q. Does it increase the damages to the property that would exist if it were not there? A. The road itself?

Q. Yes. A. I cannot really see that the opening is of any advantage at all; and if it were closed you would then have only the resulting damage of the presence of the tracks, the difference between the opening and closing. Another difference is the change of grade.

Q. Is the damage which you term the damage resulting from the tracks increased by putting a road between those tracks and the property? A. No; I say if you simply put the tracks there and

shut the road up, or even open the road, you would then have the presence of the tracks.

Q. You stated in answer to a question that the opening of this road was of no benefit because it was a cul-de-sac. A. Yes.

Q. The cul-de-sac exists now. It is closed beyond New York avenue to be extended. So what difference is there between the
108 straightening of this road and—— A. It may be today closed, but it has not been heretofore.

Q. We are talking about what the conditions are today. A. Prior to the recent works, Brentwood road was entirely open.

Q. Of course it was. Prior to the passage of the act of 1903 it was entirely open, but it is not today. It is closed down to the north line of New York avenue. A. Your question is whether it has not been closed all the time?

Q. Whether this road is straightened or left as it is, is it not a cul-de-sac? A. Yes, it is a cul-de-sac now, after you shut it up here at New York avenue.

Q. It is closed down to New York avenue? A. Yes.

Q. So that the only part that is open, whether it is straightened or not, is between New York avenue and Florida avenue? A. Certainly; you have stopped it.

Q. It does not make any difference whether this line is carried on, or the old line, it is only open from New York avenue to Florida avenue. A. That is right.

Q. What would be the condition of things with this road straightened and New York avenue opened, as to the effect upon the
109 value of this property? A. If New York avenue were opened?

Q. Yes, and this road straightened and continued? A. Keeping in mind the change of grade made essential by this straightening of the road, and the depression of Florida avenue, I do not think running New York avenue farther east would be of any great benefit. I do not see any benefit at all.

Q. Is that change of grade made by straightening Brentwood road, or by the construction of the terminal? A. It is made under the act of Congress, and is necessary by reason of the construction, and not by reason of the change of Brentwood road.

Q. If the old road stayed there, the change would have to be made, and about the same per cent. grade would be established, would it not, to meet the conditions at Florida avenue? A. I fancy it would have to be.

Q. So that the straightening of the road does not make any necessity for a greater grade an essential, but that necessity comes because of the terminal construction? A. Because of the depression of Florida avenue.

Q. Is a 4 per cent. grade a very heavy grade for a street or road? A. It is a pretty heavy grade. It is about the grade, as I recall it, on 4½ street from C to D, right here in front of the court-house. It might be a little more than that, but I think not. I think that is about what it is.

110 Q. From C to D you think is a 4 per cent. grade? A. In the neighborhood of a 4 per cent. grade.

Q. Is there any trouble about hauling up there? A. You don't see many coming uphill with their teams. Those that do generally stop half way and turn around and go back.

Q. Mr. Daish, has not the travel on Brentwood road been very positively diverted in late years by the paving and opening up of T street? A. No; not to any great extent. The only way you could get through to T street would be at Lincoln avenue—I mean conveniently—or going north to R and east on R to Second.

Q. S street was used too, was it not? A. Not much.

Q. I thought it was, because—— A. There was no gate formerly at R street—ten years ago, I think.

Q. I say, within the last few years we have had gates there. A. Yes.

Mr. JOHNSON: I understood Mr. Hamilton was inquiring about S street.

Mr. HAMILTON: I was getting down along the line, Mr. Johnson.

The WITNESS: I think the gate at R street was put up, to the best of my recollection, about 1895 or 1896; perhaps even a little later than that.

111 Q. No; it was put up in 1896. A. And T street in recent years has had no gate. Perhaps it has now; I don't know.

Q. Yes; it has had one for several years. The reason I asked that question is that I was compelled to put gates there because of the people living back in that neighborhood? A. That was after a certain man was killed, was it not? I do not intend to be impertinent at all.

Q. No; they compelled us to put gates there because they stated that nearly all of the travel of market and milk men and all that came in from this section of the country came down and across the railroad at that point, and we were compelled to gate one after the other of these crossings to meet the demands of that crossing. I thought maybe it was because of travel from the Brentwood road? A. On T street, east of the Metropolitan tracks to the house where Mr. Alvey lived, there was quite a bad place to get into the road.

Q. It was paved? A. Yes; but there was a sudden jolt going into the road.

Testimony on both sides was thereupon announced closed.

The commission thereupon adjourned until Monday, November 14, 1904, at 10.30 o'clock a. m.

112 *Bill of Exceptions.*

Filed November 29, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re Condemnation by THE BALTIMORE AND OHIO RAILROAD COMPANY of Part of the Tract of Land in the District of Columbia Known as Youngsborough. District Docket, No. 626.

Be it remembered that this cause came on for hearing upon the petition or instrument of appropriation of the Baltimore and Ohio Railroad Company filed herein and the answer and amended answer of the respondents Francis Winslow, Augustus Jay and the American Security and Trust Company, trustees, Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson, and was argued by counsel for petitioner and respondents and considered by the court, whereupon all the objections raised by the respondents in their said answer and amended answer, were, by the court, on the 18th day of October, 1904, overruled, to which ruling in this behalf respondents by their counsel then and there excepted; and be it further remembered that on the said 18th day of October, 1904, Clement W. Howard, John A. Hamilton and Robert I. Fleming having been summoned by the court to act as appraisers to appraise the damages which the said respondents would sustain by reason of said appropriation, being interrogated with respect thereto, it appeared to the court that the nearest real estate to that involved in these proceedings in which the said Clement W. Howard had a freehold interest was situated on C street north between Third and Four and one-half streets west; that the nearest real estate to the said land herein involved in which the said John
113 A. Hamilton had a freehold interest was situated at the corner of First and N streets, northwest; and that the nearest real estate to that involved herein in which the said Robert I. Fleming had a freehold interest was situated on Twelfth street, west between I and K streets north, all in the city of Washington, District of Columbia; thereupon counsel for respondents severally objected to the appointment of each and every of the said persons as such an appraiser on the ground that no one of them was a freeholder of the neighborhood in which the land, in these proceedings described, lies, within the meaning of the statute, but the court overruled said several objections, as to each one of said named persons and held each of said named persons to be qualified for appointment as such appraisers, to which ruling in this behalf respondents by their counsel then and there as to each of said appraisers severally excepted; and thereupon the court appointed the said Clement W. Howard, John A. Hamilton and Robert I. Fleming such appraisers, and the

same were sworn as such in the cause, to which judgment in this behalf counsel for respondents excepted. All which exceptions it is prayed by respondents may be saved to them, signed and sealed, by the court, which is accordingly done this 29th day of November, 1904, now for then.

ASHLEY M. GOULD, *Justice.* [SEAL.]

114 *Exceptions to Award and Appraisement.*

Filed November 30, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In the Matter of the Condemnation by THE BALTIMORE AND OHIO RAILROAD COMPANY of Certain Lands in the County of Washington Situated at the Intersection of Florida Avenue, Delaware Avenue, and Brentwood Road, According to the Description and Plat Herein Filed, Being a Part of "Youngborough." No. 626, District Docket.

Now comes the petitioner in the above-entitled matter, The Baltimore and Ohio Railroad Company, and excepts to the award and appraisement, and to each item thereof, filed herein on the 21st day of November, A. D., 1904, appraising the value of the land sought to be included in these proceedings, and appraising the injury and damage to the remaining part of the tract, of which the land taken in condemnation is a part, for the following reasons, namely:

1st. Because the appraisement of the value of the land included in these proceedings, containing 27,225 square feet, at $1.30 per foot, is excessive.

2nd. Because there is no evidence to support the appraisement of said land.

3rd. Because said appraisement is contrary to the evidence.

4th. Because said appraisement is contrary to the weight of evidence.

5th. Because under the law there was no right or authority in the commission to assess damages to the remaining part of the tract of land.

6th. Because the assessment of damages to said remaining part is excessive.

7th. Because there is no evidence to sustain the assessment
115 of damages to said remaining tract.

8th. Because the assessment of damages to said remaining tract is inconsistent with the assessment and appraisal of the value of the land taken.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By GEORGE E. HAMILTON, *Its Attorney.*

HAMILTON & COLBERT, *Att'ys.*

116 *Withdrawal of Exceptions to Award, &c.*

Filed March 31, 1905.

In the Supreme Court of the District of Columbia.

In the Matter of the Condemnation by THE BALTIMORE AND OHIO RAILROAD COMPANY of Certain Property in "Youngsborough." District, No. 626.

Now comes the petitioner in the above-entitled matter and withdraws the exceptions heretofore filed by it to the award and appraisement filed herein by the appraisers appointed by the court, and agrees that said award and appraisement may be ratified and confirmed by the court.

HAMILTON & COLBERT,
Attorneys for Petitioner.

Withdrawal of Certain Objections by Respondents.

Filed April 19, 1905.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re Condemnation of a Part of Youngsborough by THE BALTIMORE AND OHIO RAILROAD COMPANY. No. 626, District Docket.

Come now the respondents, by their solicitor, William G. Johnson, and withdraw and abandon all the objections by them heretofore made to these proceedings save and except the objection that the petitioner is not authorized to acquire by condemnation
117 to its use part of the land in respondents' answers described without also condemning to its use the entire tract, and the further objection that the petitioner is not authorized to continue open to public use as a public highway and as a deflection or continuation of the Brentwood road a portion of the land of respondents as set forth in its petition and instrument of appropriation.

W. G. JOHNSON,
Solicitor for Respondents.

Order Confirming Award.

Filed April 20, 1905.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re Condemnation of a Part of Youngsborough by THE BALTIMORE AND OHIO RAILROAD COMPANY. No. 626, District Docket.

It appearing to the court that the exceptions heretofore filed by the petitioner to the appraisement and award of damages returned by the appraisers appointed herein, have been withdrawn, it is thereupon by the court this 20th day of April, A. D. 1905, adjudged, ordered and decreed that the said appraisement and award returned by the appraisers be and the same is hereby in all things ratified and confirmed.

And it further appearing to the court that the petitioner has paid into the registry of the court the sum of $45,392.50,
118 being the full amount of the appraisement and award returned by the appraisers, it is by the court further adjudged, ordered and decreed that the fee simple title to the land in the petition and instrument of appropriation particularly described, be and the same is hereby vested in the said petitioner, The Baltimore and Ohio Railroad Company.

And it is further adjudged, ordered and decreed that the petitioner pay all the costs of this cause, down to and including the entry of this decree, to be taxed by the clerk, including the fees and commission of the clerk, on the said sum of $45,392.50 paid into the court as aforesaid by the petitioner.

ASHLEY M. GOULD, *Justice.*

Order Directing Payment of $35,392.50 to Respondents.

Filed April 20, 1905.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re Condemnation of a Part of Youngsborough by THE BALTIMORE AND OHIO RAILROAD COMPANY. No. 626, District Docket.

Upon motion of the respondents herein by their solicitor William G. Johnson, it is by the court this twentieth day of April, A. D. 1905, ordered that the clerk of this court be and he is hereby directed to pay over to the respondents or their solicitor of record the sum of thirty five thousand three hundred and ninety two
119 dollars and fifty cents, the amount of the appraised value of the land of the respondents described in the instrument of appropriation herein as fixed by the return of the appraisers herein.

ASHLEY M. GOULD, *Justice.*

Notice of Appeal.

Filed April 27, 1905.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re Condemnation of Part of Youngsborough by THE BALTIMORE AND OHIO RAILROAD COMPANY. No. 626, District Docket.

Come now the respondents herein and note an appeal to the Court of Appeals of the District of Columbia from so much of the decree of April twentieth, 1905, confirming the return and award of the appraisers herein as fails to require the petitioner, The Baltimore and Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation.

W. G. JOHNSON,
Solicitor for Respondents.

120 *Order Authorizing Deposit for Costs on Appeal.*

Filed April 27, 1905.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re Condemnation of Part of Youngsborough by THE BALTIMORE AND OHIO RAILROAD COMPANY. No. 626, District Docket.

The respondents herein having taken an appeal to the Court of Appeals of the District of Columbia from the decree herein passed on April 20th, 1905, it is by the court this 27th day of April, 1905, ordered that the said respondents be and they are hereby authorized to pay to the clerk of this court the sum of one hundred dollars as a deposit for costs on appeal in lieu of a bond or other security for costs on said appeal.

ASHLEY M. GOULD, *Justice.*

Memorandum.

May 9, 1905.—$100. deposited by appellant in lieu of appeal bond.

121 *Direction for Preparation of Record.*

Filed May 17, 1905.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States.

In re Condemnation of Part of Youngsborough by THE BALTIMORE AND OHIO RAILROAD COMPANY. No. 626, District Court Docket.

Memorandum.

In preparing the transcript on appeal herein the clerk will include therein the following papers only:

Petition and instrument of appropriation,
Order to answer.
Answer of respondents with exhibit.
Amended answer of respondents with exhibit.
Order appointing appraisers.
Instructions to appraisers.
Report of appraisers and testimony and exhibits.
Bill of exceptions on rulings of court.
Exceptions to award in behalf of petitioner.
Withdrawal of exceptions by petitioner.
Withdrawal of certain objections by respondents.
Decree confirming award and appraisement and vesting title in petitioner.
Order directing payment of $35,392.50 to owners.
Note of appeal to Court of Appeals.
Order authorizing deposit of $100 for costs on appeal in lieu of bond.

W. G. JOHNSON,
Counsel for Respondents.

122 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 121, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 626, district court, in the matter of the condemnation by the Baltimore and Ohio Railroad Company of part of a tract of land located in the county of Washington, District of Columbia, and formerly known as "Youngsborough," as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 16th day of June, A. D. 1905.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1570. Francis Winslow *et al.*, appellants, *vs.* The Baltimore and Ohio Railroad Company, a corporation. Court of Appeals, District of Columbia. Filed Jun- 17, 1905. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

FRANCIS WINSLOW ET AL., Appellants,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

No. 1570. October Term, 1905.

Now comes the appellee in the above entitled cause, the Baltimore and Ohio Railroad Company, and moves the Court to dismiss the appeal taken by the appellants from the decree of the Supreme Court of the District of Columbia entered on the 20th day of April, 1905, for the reasons following, to wit:

By virtue of the provisions of Section 9 of the Act of Congress approved February 28, 1903, providing for the construction of a union railroad station in the District of Columbia, and for other purposes, it is enacted that the Baltimore and Ohio Railroad Company might acquire by purchase or condemnation the lands and property necessary for all and every of the purposes contemplated by said Act, and a certain other Act approved February 12, 1901, and Section 9 of said Act of February 28, 1903, and section 10 of said Act of February 12, 1901, further provided that such condemnation should be effected in the manner provided by Sections 618 to 676, both inclusive, of the Revised Statutes relating to the District of Columbia. Section 658 of said Revised Statutes relating to the District of Columbia, provides that the award of the arbitrators appointed to effect such condemnation might be reviewed by the Court in which the proceedings were had on written exceptions filed by either party in the Clerk's office within ten days after the filing of such award.

The appellee further shows to the Court that the property involved in these proceedings was condemned for the use of the Baltimore and Ohio Railroad Company pursuant to the provisions of the Acts of Congress above referred to, and the award of the appraisers or Commissioners appointed to effect such condemnation was filed in the Supreme Court of the District of Columbia on the 21st day of November, 1904, and said award was confirmed by the Justice of the Supreme Court of the District of Columbia holding a District Court of the United States on the 20th day of April, 1905. No exceptions to said award were filed by the appellants within ten days after the filing of the award and no exceptions were ever filed thereto by the appellants.

The appellee further shows unto the Court that by virtue of the provisions of said Acts of Congress, no appeal to this Court is provided for in any event. The appellee further shows to the Court that on the 20th day of April, 1905, upon motion of the appellants the Court below directed the payment to said appellants of the sum of $35,392.50, being the value of the strip of land appropriated by the appellee, thereby accepting a portion of the award of the appraisers, but an appeal from so much of the decree of April 20, 1905,

confirming the return and award of the appraisers as failed to require the appellee to acquire the entire tract of land described in the answer of the appellants filed in the Court below, and the appellee says that the appellants can not accept the benefits of a portion of the decree of the Court below and appeal from the remainder thereof.

Wherefore the appellee prays that the appeal taken as above mentioned may be dismissed.

HAMILTON & COLBERT,
Attorneys for Appellee.

William G. Johnson, Esq., Attorney for Appellants:

Take notice that the foregoing motion will be called to the attention of the Court of Appeals of the District of Columbia on Tuesday, October 3rd, 1905, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

HAMILTON & COLBERT,
Attorneys for Appellee.

(Endorsed:) No. 1570. October Term 1905. Francis Winslow *et al. vs.* The Baltimore and Ohio Railroad Co. Motion to Dismiss Appeal. Court of Appeals, District of Columbia, Filed Sept. 28, 1905. Henry W. Hodges, Clerk.

Wednesday, November 8th, A. D. 1905.

No. 1570.

FRANCIS WINSLOW, AUGUSTUS JAY, and AMERICAN SECURITY AND TRUST COMPANY, Trustees, and KATE LA MONTAGNE, HARRIET WINSLOW, and ELIZABETH P. PATTERSON, Appellants,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

The appellee's motion to dismiss the appeal in the above entitled cause was submitted to the consideration of the Court by Mr. G. E. Hamilton, in support of motion, and by Mr. W. G. Johnson, in opposition thereto, with leave to appellants to file reply brief herein if so advised.

Wednesday, November 15th, A. D. 1905.

No. 1570. October Term, 1905.

FRANCIS WINSLOW, AUGUSTUS JAY, and AMERICAN SECURITY AND TRUST COMPANY, Trustees, and KATE LA MONTAGNE, HARRIET WINSLOW, and ELIZABETH P. PATTERSON, Appellants,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

On consideration of the appellee's motion to dismiss the appeal in the above entitled cause, It is by the Court this day ordered that

said motion be, and the same is hereby, postponed until the hearing of the case on its merits.

Per Mr. CHIEF JUSTICE SHEPARD.

November 15, 1905.

Wednesday, February 7th, A. D. 1906.

No. 1570.

FRANCIS WINSLOW, AUGUSTUS JAY, and AMERICAN SECURITY AND TRUST COMPANY, Trustees, and KATE LA MONTAGNE, HARRIET WINSLOW, and ELIZABETH P. PATTERSON, Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

The argument in the above entitled cause was commenced by Mr. W. G. Johnson, attorney for the appellants, and was continued by Mr. G. E. Hamilton, attorney for the appellee.

Thursday, February 8th, A. D. 1906.

No. 1570.

FRANCIS WINSLOW, AUGUSTUS JAY, and AMERICAN SECURITY AND TRUST COMPANY, Trustees, and KATE LA MONTAGNE, HARRIET WINSLOW, and ELIZABETH P. PATTERSON, Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

The argument in the above entitled cause was continued by Messrs. G. E. Hamilton and M. J. Colbert, attorneys for the appellee, and was concluded by Mr. W. G. Johnson, attorney for the appellants.

MEMORANDUM.—Decree of March 6, 1906, dismissing appeal, canceled by direction of Court June 13, 1906.

MEMORANDUM.—Opinion of March 6, 1906, withdrawn from files June 13, 1906, by the Court.

In the Court of Appeals of the District of Columbia, October Term, 1905.

No. 1570.

FRANCIS WINSLOW ET AL., Appellants,

vs.

BALTIMORE & OHIO RAILROAD, Appellee.

Come now the appellants in the above-entitled cause by Wm. G. Johnson, their counsel of record herein, and move the Court to set

aside the judgment rendered herein on the 6th day of March, dismissing the appeal in this cause for want of jurisdiction and to grant a rehearing upon the motion to dismiss the appeal herein.

For grounds for said motion appellants show that they are advised by counsel that the question of the right of appeal from the order of the Court below in a proceeding of this character has been decided by the Supreme Court of the United States in affirmance of such right of appeal in the case of Railroad Company *v.* Church, 19 Wall. 62. That said decision of the Supreme Court of the United States was not brought to the attention of this Court on the hearing of this cause, either in the briefs or oral argument of counsel for appellants or appellees and was not thereafter considered in the disposition of the motion to dismiss, and the same was not brought to the attention of the Court by counsel of these appellants because at the time of the hearing and prior to the decision in the case the counsel for appellants was not aware that the said decision had been made.

W. G. JOHNSON,
For Appellants.

I hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purposes of delay.

W. G. JOHNSON,
For Appellants.

(Endorsed:) No. 1570. Francis Winslow *et al., vs.* The B. & O. R. R. Co. Petition for Rehearing. Court of Appeals, District of Columbia. Filed Mar. 13, 1906. Henry W. Hodges, Clerk.

Thursday, March 15th, A. D. 1905.

No. 1570.

FRANCIS WINSLOW, AUGUSTUS JAY, and AMERICAN SECURITY AND TRUST COMPANY, Trustees, and KATE LA MONTAGNE, HARRIET WINSLOW, and ELIZABETH P. PATTERSON, Appellants,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

The petition for a rehearing in the above entitled cause was submitted to the consideration of the Court by Mr. W. G. Johnson, attorney for the appellants, in support of petition, and by Mr. M. J. Colbert, of counsel for the appellees, in opposition thereto, with leave to the appellee to file brief herein by Monday, March 19th.

No. 1570.

FRANCIS WINSLOW ET AL., Appellants,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, Appellee.

Opinion.

(Mr. Justice McComas delivered the opinion of the Court.)

This case has had careful consideration, upon a motion to dismiss the appeal, and upon its merits, and again upon a motion for a rehearing. It is an appeal from a final order of the Supreme Court of the District of Columbia, holding a District Court of the United States, in a proceeding in condemnation instituted in that Court by the Baltimore and Ohio Railroad Company, the appellee, the instrument of appropriation filed in said District Court having for its object the acquisition, by condemnation to its use, of a part of a tract of land in the District of Columbia, called Younsborough, known as the Patterson estate, belonging to Francis Winslow and others, appellants.

The Commissioners in their report awarded the appellants $45,392.50, appraising the value of the strip of land sought to be acquired by the appellee at $35,392.50, and awarding $10,000 for the injury and damage to the remaining part of the Patterson tract. The part of the Patterson tract taken by the appellee is .625 part of an acre, situated at the intersection of Florida Avenue, Delaware avenue, and Brentwood road, and is the southeast corner of a farm containing about ninety acres. In addition to land described as a tract to be used for right of way purposes, a strip of land fifty feet wide east of and immediately adjoining the land to be used for right of way purposes, and extending from the east line of the Brentwood road to the north line of Florida avenue, was taken, this last parcel to be used for relocating and straightening the Brentwood road.

The appellants resisted the proceedings on the ground that the appellee was compellable under the law to take the entire tract and could not limit the proceedings to the taking of the portion described in the instrument of appropriation. The appellees paid into the registry of the Court the full amount awarded by the appraisers. The award of the appraisers was confirmed by a final order of the Court below, and on April 20th, 1905, on the appellants' motion, said Court ordered the Clerk to pay over to the appellants the sum of $35,392.50, the amount awarded for the land taken. The remaining $10,000, at the instance of appellants, was invested to abide the further order of the Court.

1. On April 27th, 1905, the appellants noted an appeal to this Court, from so much of the decree of April 20th, 1905, confirming the return and award of the appraisers herein as fails to require the petitioner, the Baltimore and Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein, and as permits the said petitioner to limit its acquisition to the por-

tion of the said land described in the petition or instrument of appropriation."

The appellee filed a motion to dismiss this appeal. For convenience, this motion and the case made by the record were heard together.

Three reasons are urged for dismissing the appeal: 1st. That the appellants did not file within ten days after the award written exceptions thereto, nor at any time file exceptions to said award. 2nd. That no appeal to this Court was provided for in the Act of Congress under which these proceedings were instituted. 3rd. That by accepting the sum of $35,392.50, part of the award, the appellants lost their right to appeal if they had any.

"An act to provide for a Union Railroad Station in the District of Columbia, and for other purposes," approved February 28th, 1903, (32 Stat. 909), supplemented two Acts of Congress approved February 12th, 1901; the one "an act to provide for eliminating certain grade crossings of railroads in the District of Columbia and to require and authorize the construction of new terminals and tracks for the Baltimore and Ohio Railroad Company in the City of Washington, and for other purposes," (31 Stat. 775); the other, "an act to provide for eliminating certain grade crossings on the line of the Baltimore and Potomac Railroad Company in the City of Washington, and require said Company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes," (31 Stat. 767).

The two earlier acts intended to eliminate grade crossings in the Capital and to secure in the one case a better railway station and in the other a better location of a new and better railway station. The latest act wisely supplemented this purpose by requiring the two roads to construct and maintain an adequate Union Railroad Station at a convenient location fixed by the act, the station to be a joint construction; and Congress also provided for the creation of a terminal company in aid of this extensive project for improving the Capital, fixed the routes of connection of the two railroads, the location of freight yards to subserve the public interest, required certain forms of construction, and in aid of the broad and comprehensive plan, directed that streets and avenues be closed and that others be opened, and exercised its sovereign powers over the Federal District to grant rights of way and a spacious location of a Union Station and of yards, and utilized the modes of condemnation of lands and of opening and closing streets heretofore given by it to the municipal government of the District of Columbia.

In section 9 of the act of February 28th, 1903, Congress provided:

"SEC. 9. That in the execution of the powers conferred by this Act, or by either of said before-mentioned Acts, approved February twelfth, nineteen hundred and one, by the terminal company, the Philadelphia, Baltimore and Washington Railroad Company, or the Baltimore and Ohio Railroad Company, each of said companies may acquire, by purchase or condemnation, the lands and property necessary for all and every the purposes contemplated by each of said

last-mentioned Acts and this Act respectively; and such condemnation shall be effected in the manner and by the methods and processes provided *by sections six hundred and forty-eight to six hundred and sixty-three, both inclusive, of the Revised Statutes relating to the District of Columbia*, which said sections, despite any repeal thereof, are hereby continued in full force and effect, and, for the purposes contemplated by this section, are hereby specially enacted with like effect as if the same were incorporated herein at length: *Provided*, That in every case wherein an assessment of damages or an award shall have been returned by the appraisers the company, upon paying into court the amount so assessed or awarded, may enter upon and take possession of the land and property covered thereby, irrespective of whether exceptions to said assessment or award shall be filed or not, and the subsequent proceeding shall not interfere with or affect such possession, but shall only affect the amount of compensation to be paid."

The section just quoted, for such condemnations, reenacts sections 648 to 663, both inclusive, of the Revised Statutes of the District of Columbia. But section 10 of the Act of February 12th, 1901, (Public No. 50) provides:

"SEC. 10. That if for the purpose of constructing and owning the terminals, viaduct, railroads, depots, stations, and other works authorized by this Act, or any part thereof, The Baltimore and Ohio Railroad Company shall deem it expedient or advisable that a terminal company in its interest be created and organized in the District of Columbia, the said Baltimore and Ohio Railroad Company, or some person thereto authorized on its behalf by resolution of its president and directors, together with other persons not less than seven in number, of whom a majority shall be residents of the District of Columbia, shall cause a certificate of incorporation to be executed and recorded in accordance with the provisions of the general incorporation Act of Congress for the District of Columbia relating to railroad companies, *being sections six hundred and eighteen to six hundred and seventy-six, both inclusive, of the Revised Statutes relating to the District of Columbia*, with such capital stock, not to exceed five million dollars fully paid up, and under such corporate name as may be set forth in such certificate. *The corporation so formed shall be vested with all the authority, rights, and privileges granted by said general act.* * * * Said corporation shall also be vested with and enjoy all the authorities, rights, and privileges herein granted, so far as the same are applicable to or exercisable in its undertaking, as set forth in its said certificate of incorporation, and it shall be bound by all the limitations and provisions of this Act."

Section 8 of the act of February 28th, 1903, enacts that "except as modified by this act all the provisions of said act relating to the Baltimore and Ohio Railroad Company, approved February 12th, 1901, shall be and remain in full force and effect." The appellants insisted that because section 9, of the Act of February 28th, 1903, provides the power and manner of condemnation for the terminal company and for each of the railroad companies, or by one acting

for all, that the railroad companies derived no right or authority under sections 656 and 647 of the Revised Statutes, D. C. There was no terminal company, and the appellee was, therefore, by section 10 of the act of February 12th, 1901, given the aid of Revised Statutes, D. C., sections 618 to 676, both inclusive. In our opinion, the appellee has, therefore, such right and authority under sections 646 and 647 given it in section 10 of the said act of 1901. We observe also that section 11 of the act of 1901, and section 9 of the act of 1903, contain like provisions for the acquisition and condemnation of lands and like inclusion of said section 648 to 663, both inclusive, of the Revised Statutes of the District. If this condemnation had proceeded under the act of 1901, these companies unquestionably would have had the rights and authority contained in sections 646 and 647, and in the present proceeding, from the matters before stated, we repeat, the appellee was given such rights and authority as are contained in the two last mentioned sections of said Revised Statutes.

Section 646 empowers a railroad whose tracks shall cross a highway where an embankment shall make a change in the line of such highway to take additional lands for the construction of such highway, and section 647 provides for the condemnation of such additional land and that the same shall become part of such highway and held for highway purposes. Accordingly in the proceeding of condemnation we are here considering a triangular piece of land was taken, part for the railway and part to relocate and straighten Brentwood road from New York avenue to Florida avenue, thus affording a roadway fifty feet wide. The instrument of appropriation asked for the acquisition by condemnation of this triangular piece of land, .625 of an acre, being the corner of the Patterson farm bounded by Brentwood road and Florida avenue. The total award of the Commissioners, by their report filed November 21st, 1904, was, as we have said $45,392.50, all of which was the appraised value of this land, except $10,000, which was awarded as damages to the rest of the Patterson farm. The appellants filed no exception to such award, which was confirmed April 20th, 1905, and on April 27th, 1905, the appellants filed their notice of appeal to this Court.

2. By sections 650 and 654, Revised Statutes, D. C., made part of the Act of February 28th, 1903, such condemnation proceedings were to be taken and carried on in the Supreme Court of the District and the only appeal from the Commissioners' award in condemnation provided is in section 658, Revised Statutes, D. C.:

"SEC. 658. The award of the arbitrators may be reviewed by the court, in which such proceedings may be had, on written exceptions filed by either party, in the clerk's office, within ten days after the filing of such award, and the court shall take such order therein as right and justice may require, by ordering a new appraisement, on good cause shown."

Section 659 provides that "the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." The first proviso to section 9 of the Union Station act states that the Company, after paying into Court the money awarded, may take

possession of the land covered thereby, and the subsequent proceedings "shall only affect the amount of compensation to be paid."

Thus Congress in these successive railroad and Union Station acts provided for the condemnation of land and for a special appeal from the award of the appraisers. Congress confined the proceedings to the Supreme Court of the District and limited the appeal for review in this case to the same Court in which these proceedings were had, and Congress further limited the scope of the appeal so that the subsequent proceedings on the appeal should only affect the amount of compensation.

In proceedings for condemnation of lands for public use, the proceedings are either carried on under the supervision of a court of general jurisdiction or usually an appeal is provided to such a Court. The Courts of many States hold that there can be no appeal unless granted by statute. In this case, the sections 658 and 659, Revised Statutes, D. C., just quoted, grant the only appeal afforded by these acts of Congress.

The appellants here did not file any written exceptions within ten days because the appeal would only affect the amount of compensation, and the appellants were satisfied with the compensation for the *land taken*, and the appellants object was upon the appeal to raise the question of the obligation of the appellee to *condemn land not taken*. The appellants insist that if the judgment of the Court in this case upon a question of law submitted to it for a decision can be reviewed at all, it must be by appeal to this Court from the judgment complained of under its general jurisdiction and not by appeal to the Court below by exceptions to the amount of the award of the appraisers which is not here complained of. The appellants admit that there is no provision in the relevant Act of February 12th, 1901, (31 Stat. 780), but insist that section 11 of that act authorizes and empowers the appellee to acquire lands" by condemnation as provided in section 648 to 663, both inclusive, of the Revised Statutes relating to the District of Columbia, and that section 11 contemplates a judicial proceeding in the Supreme Court of the District of Columbia, and under existing laws any final judgment of the Supreme Court of the District was subject to be reviewed on appeal to this Court.

The appellants insist that the Code of this District provide for special terms of the Supreme Court of the District of Columbia and for special terms of the District Court of the United States, and confers on the latter Court jurisdiction of all proceedings instituted in the exercise of the right of eminent domain; and that by section 226 of the Code "Any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia, or of any justice thereof, * * * may appeal therefrom to the said Court of Appeals." The jurisdiction of the special term of the Supreme Court of this District holding a District Court of the United States, was invoked and exercised in this case, and the final order or decree here appealed from was passed. The appellant contends that the words of Section 226 conferring appellate jurisdiction on this

Court are ample to include this appeal from this final order or decree in a proceeding for the condemnation of land.

The two acts of 1901, and the act of 1903, last mentioned, are not intended to disturb the existing judicial system of this District, nor the jurisdiction of this Court to review an order, judgment, or decree of the Supreme Court of this District as heretofore.

The summary proceedings for the condemnation of land are statutory exercises of the power of eminent domain in cases where the ordinary processes of law would seem to be inadequate and even inappropriate and where such a statute gives a limited appeal by a special mode it would apparently negative the right to appeal in any other manner. The Court below had the power and jurisdiction to affirm the award in this case. It would appear the intent of Congress is that such action should not be reviewed in this Court, and that if the judgment of the Court below was rendered within the limits of the special jurisdiction conferred upon it, it was not only binding but final.

Very many of the Courts of last resort in the States where the right of appeal from the lower Court is given in terms substantially the same as is given in section 226 of the Code of this District, hold that such railroad companies having the authority to condemn, and the lower Court, usually the Circuit Court, having exclusive and final jurisdiction over the subject matter, the Appellate Court has no jurisdiction to review any of the questions presented by the record because the judgment of the Court below is conclusive and its control exclusive, and then when its determination was made the whole matter was finally concluded: That the jurisdiction conferred upon the lower Court in these cases is a special statutory one and in respect of all matters within the scope of the jurisdiction its judgment is final and conclusive: That by such statutes there is no appeal expressly given to the Appellate Court, such statutes usually investing the lower Court with the power of reviewing and confirming or setting aside inquisitions like the present: That from the nature and course of their proceeding this power of review is a fit subject for litigation in a Circuit Court but is wholly inappropriate to the jurisdiction of an Appellate Court. Among such cases, see Moores *vs.* Water Co., 79 Md. 397; Brown *vs.* Railroad Co. 58 Md. 544; W. & S. R. R. Co. *vs.* Condon, 8 G. & J. 443; Chappell *vs.* Edmonson Avenue Co., 83 Md. 543; *In re* D. H. Canal Co., 69 N. Y. 211; N. Y. W. S. & B. R. R. Co., 94 N. Y. 290; N. Y. & H. R. R. R. Co. 98 N. Y. 12.

We have carefully examined the question of the right of appeal and overrule the motion to dismiss this appeal upon the authority of the cases to which we now refer. In Railroad *vs.* Church, 86 U. S. 62, where, not the Railroad Company, but the Church instituted proceedings before the marshal and a jury of this District against the Railroad Company to recover from it damages which the Church had sustained by reason of the road of the company having been run through a street in front of the church. The jury assessed the damages and the Supreme Court of this District confirmed the inquisition and a judgment was rendered that the Church recover the sum named with costs. By writ of error the Railroad brought the

case to the Supreme Court and the Church moved to dismiss it for want of jurisdiction upon the ground: (1) that the proceeding is in its nature summary and special and is of that character in which the action of the Court confirming or quashing the verdict of the jury is conclusive and admits of no appeal; (2) that the proceeding in such case is governed both before the jury and in the Supreme Court of the District by a statute of Maryland which by the uniform construction of the Courts of that State does not allow an appeal or writ of error to any other Court; but the Court said: "It is certainly true that the proceeding is of the character asserted in the propositions on which the want of jurisdiction is based, and that, as a general rule, no appeal or writ of error lies in this class of cases.

But the appellate jurisdiction of this Court over the doings of the Supreme Court of the District is established and regulated by act of Congress, and a reference to the statute on this subject is necessary to the decision of the question before us. The act which created the Supreme Court of the District of Columbia vested in it the same powers and jurisdiction that had previously belonged to the Circuit Court, which is superseded, and the appellate power of *this* court was declared to be the same as that which it had, by law, over the Circuit Court. The act of February 27th, 1801, organizing the Circuit Court, declares that any final judgment, order, or decree in said Circuit Court, where the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States by writ of error or appeal, and though the sum limiting this jurisdiction has been increased to $1,000, this statute remains the sole rule governing the right of appeal in all other respects.

We are of opinion that both the questions raised by the motion to dismiss have been explicitly decided by this Court. In the case of Custiss *v.* Turnpike Co. 6 Cranch 233, an assessment for land taken for use of the company was quashed by the Circuit Court, and a writ of error was sued out by Custiss from this Court. A motion was made to dismiss this writ on the same ground taken in the present case, namely, want of jurisdiction; to which Marshall, C. J., replied, that 'at the opening of the case some doubt was entertained as to the jurisdiction of the Supreme Court; but that doubt is removed by an inspection of the act by which the Circuit Court of the District — Columbia is constituted. The words of that act, descriptive of the appellate jurisdiction of this court, are more ample than those employed in the judicial act." He then quotes them as we have given them above.

But perhaps the most conclusive case in this branch of the discussion, namely, the proposition that the statute of Maryland governs the right of appeal in the present case, because by the act of Congress it is adopted as the mode of proceeding in assessing damages and in defining the power of the Supreme Court of the District in the matter, is that of Carter's Heirs *v.* Cutting, 8 Cranch 251. That was a case in which an order of the Orphans' Court of Alexandria county, being affirmed in the Circuit Court, an appeal was taken to this Court, and a motion was made to dismiss that appeal. This motion was

based upon the twelfth section of the same act of February 27th, 1801, by which it was declared that the Circuit Court, in appeals from the Orphans' Court, shall therein have all the power of the chancellor of the State of Maryland; and by the laws of Maryland the decree of the chancellor in such case was final.

It will be observed that the analogy between that case and the present is perfect. But the court said in that case that the conclusiveness of the sentence formed no part of the essence of the powers of the court. Its powers to act are as ample, independent of their final quality, as with it. And referring to the language so often cited already, they say: 'We cannot admit that construction to be a sound one which seeks by remote inferences to withdraw a case from the general provisions of a statute which is clearly within its words and perfectly consistent with its intent.'

We do not feel at liberty to disregard these contemporaneous expositions of an act of Congress which has furnished the criterion of our jurisdiction ever since the courts of the District were established, and they are so directly in point that we cannot dismiss the writ without overruling them. The motion, is, therefore, denied." Railroad *vs.* Church, *supra* 63, 64, 65.

In Ormsby *vs.* Webb, 134 U. S. 47, 61, where the Supreme Court was discussing its jurisdiction to re-examine the final judgment or decree of the Supreme Court of this District, the Court repeated the language of Chief Justice Marshall in the Custiss case and added: "In Railroad Co. *v.* Church, 19 Wall. 62, the jurisdiction of this court to re-examine the final order of the Supreme Court of this District confirming an inquisition of damages returned therein, and which was instituted before the marshal and a jury of the District, was sustained. The court said that its powers to review the judgments and final orders of the Supreme Court of the District was as ample as its power over the final judgments, orders and decrees of the Circuit Court which it superseded. These two adjudications illustrate to some extent, the nature of the cases from the Courts of this District which may be re-examined here, and show that the question now before us is to be determined by the acts of Congress defining the relation between the court and the highest court of this District, and not by reference to the statutes of Maryland, or to the statutes defining our jurisdiction to review the judgments of the Circuit Courts of the United States, held in the several States. And we may repeat here what Chief Justice Marshall said in Young *v.* Bank of Alexandria, 4 Cranch, 384, in which the main question was as to the power of this court to review the judgments of the Circuit Court of this District in a certain class of cases: "The words of the act of Congress being as explicit as language can furnish, must comprehend every case not completely excepted from them.'"

In B. & P. R. R. Co. *vs.* Trustees, 91 U. S. 127, the Supreme Court of the District had confirmed an inquisition of damages by a marshal's jury and the railroad sued out a writ of error to the Supreme Court which took jurisdiction and affirmed the Supreme Court of the District which had confirmed the inquisition of damages.

In Kohl *et al. vs.* United States, 91 U. S. 367, the Court said:

"Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court."

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it ,even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain,—and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, *when initiated* in a court." Kohl *et al. vs.* United States, *supra* 375, 376.

It is to be observed that the Court was here speaking of an act of Congress under authority of which a suit for condemnation of land for a United States court house in Cincinnati had been instituted in the proper Circuit Court of the United States, and under the laws of Ohio it was regular to institute a joint proceeding against all the owners of lots proposed to be taken. See also United States *vs.* Jones, 109 U. S. 513.

In Chappelle *vs.* United States, 160 U. S. 489, 513, the condemnation proceeding instituted and concluded in a Court of the United States was in substance and effect an action at law.

In Searl *vs.* School District, 124 U. S. 197, 199, it was held that the proceeding authorized by the statute of Colorado for condemning land to public use for school purposes is a suit at law within the meaning of the Constitution and the acts of Congress conferring jurisdiction upon the courts of the United States which may be removed into a Circuit Court of the United States from a State Court.

In Boom Co. *vs.* Patterson, 98 U. S. 403, 406, where Patterson had appealed in a condemnation proceeding to the State District Court in Minnesota, and then as a citizen of Illinois obtained the removal of the case to the Circuit Court of the United States, where it was tried, speaking of the right of eminent domain, the Supreme Court said: "But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties,—the owners of the land on the one side, and the company seeking the appropriation on the other,—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those

terms. But when it was transferred to the District Court by appeal from the award of the Commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

See also Monongahela Navigation Co. *vs.* United States, 148 U. S. 312, in which case of condemnation proceedings an appeal was taken as provided by the statutes of Pennsylvania, which appeal gave the right to a trial *de novo* according to the course of the common law.

Without further discussion we conclude that these rulings of the Supreme Court instruct us that such a proceeding as this, to take land by condemnation and determining the compensation to be made for it, is a suit at common law when initiated in a court, that the jurisdiction of the Special Term of the Supreme Court of this District holding a District Court of the United States, passed the final order or decree here appealed from, and that this Court has the power and duty to review such order on appeal under the general jurisdiction conferred by section 226 of the Code.

3. In taking the present appeal it may — doubted whether the appellant may safely disregard the method prescribed by the statute for reviewing the award of the appraisers in the court below. The conditions imposed by statute must be complied with in order to secure the benefit of the appeal. Lewis, Em. Dom. (2d Ed.) Sec. 537. Section 658, Revised Statutes, D. C., before quoted, requires that written exceptions should be filed within ten days after the filing of such award. Appellants' counsel admit that no such exceptions were filed and for the reason that under the succeeding section 659 it is declared that "subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed," and the purpose of this appeal is not to disturb the amount of the appraisement for the *land taken*, but to determine the question of the obligation of the Company as to the *farm not taken*. We may assume, though we do not decide, that the appellants intending to submit a question of law for the decision of this Court may omit this procedure required by law because they do not desire to except to the award of the appraisers upon a question of fact. The important part of the order or decree here is the ratification of the appraisement and award.

4. The appellants' counsel correctly say that the only question to be determined is whether the Baltimore & Ohio Railroad Company is compelled to acquire the entire Patterson tract of land as described in the answers of appellants, or whether it may limit its acquisition to a portion arbitrarily selected by itself. We observe that the latter alternative is the usual case of land condemnation. But the appellants' able counsel contends that the appellee is compelled to acquire the entire tract because (1) by the specific terms of the acts we here consider the portion of the Brentwood road upon which the land of the appellants abuts is required to be closed and vacated as a public road, and (2) by the specific terms of the statute it is made the duty of the Raidroad Company as a condition to the closing of the road that it acquire all the property abutting on the road.

We have before quoted certain sections of these statutes where under the appellee in this proceeding procured the condemnation of

the land, a part taken for the railroad and a part taken to straighten and widen Brentwood road where crossed by the railroad. It resulted that Brentwood road was not closed, and unless and until it was closed, even upon the appellants' theory, the Railroad could not be compelled to acquire the Patterson farm.

We need not consider here whether Congress made it mandatory that the Brentwood road shall be vacated, abandoned by the public, and closed to its use. These appellants have accepted the $35,392.50 awarded as compensation for all the lands taken from them, including the lands whereby Brentwood road was deflected, straightened, widened and continued in public use. The appellants are estopped in this proceeding from objecting in respect of the failure to close Brentwood road or the land condemned by the appellee for relocating Brentwood road. By accepting the amount last mentioned, the appellants cannot thereafter appeal in respect of the land taken, nor of the use the appellee may make of it. The appellants by their note of appeal to this Court have abandoned all questions save the one we stated. The appellants submitted to that part of the order of the Court below concerning the land taken for the appellee's railway and for relocating the highway crossed by the railroad tracks when they accepted the amount awarded for the land which was taken the fee to which is invested in the appellee by the order appealed from. The appellants contend that while submitting to this part of the order, they have a right to appeal from another part where a reversal of the part appealed from as appellants claim would not affect rights under the portion submitted to. It is true that in Embry *vs.* Palmer, 107 U. S. 3:

"It is said that this is a release of errors. Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error can not be construed into an admission that the decree he seeks to reverse is not erroneous."

And in Reynes *vs.* Dumont, 130 U. S., 354, 394, the Court said:

"We are asked to dispose of the case adversely to appellants upon the ground that they received the remaining bonds and money after the liens decreed in Fry's favor were satisfied, but such receipt does not oust the jurisdiction. The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous."

And in Gilfillan *vs.* McKee, 159 U. S. 303, 311, where McPherson claimed an interest in two funds, and was decreed an interest in one, but denied an interest in the other, and accepted that in his favor and appealed from that which was adverse, the Court said:

"While the acceptance of a whole or a part of a particular amount

awarded to a defendant might, perhaps, operate to estop him from insisting upon an appeal, there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson, and the other applicable to the general fund in which McPherson had been denied any participation whatever. Clearly his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund. There is nothing inconsistent in his action in accepting the amount awarded to him from the special fund, and appealing from the refusal of the court to award him the general fund."

The principle announced in these cases is clear. The difficulty arises in its application in this case. The instrument of appropriation, the basis of this proceeding, limits the acquisition to the specific parcel of land described therein, part for right of way and part for relocating Brentwood road. This triangular piece of land is the subject matter of the condemnation proceeding. The answer of the appellants introduced other matters. The report of the appraisers was confined to the value of the land sought to be acquired by the appellee and to the injury and damage to the remaining part of the whole tract of land, and the final order appealed from ratified the appraisement and award returned by the appraisers which was confined to the land described in the instrument of appropriation for the said uses, and the Court's order recited that the appellee had paid into the registry of the Court the sum of $45,392.50, the full amount of such appraisement and award, and the Court further decreed that the fee in the land described in the petition and instrument of appropriation became vested in the appellee.

It appears to us that this proceeding was entire and not separable, that the matter litigated was a single matter, that the fund here was but one fund, and in our opinion the acceptance of the money received by the appellants should be held an estoppel upon their right of appeal. At least it estops appellants in this proceeding from appealing in respect of the land taken and the legality of such taking both for right of way and for relocating the highway crossed by the railway tracks.

5. The very terms of this appeal determines us to affirm the judgment of the learned Court below. The appellant appealed to this Court "from so much of the decree of April 20th, 1905, confirming the return and award of the appraisers herein, as fails to require the petitioner, the Baltimore and Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation."

We find in this record no judgment other than the final order of the Court confirming the award upon a proceeding under the petition for appropriation of the land taken. It is true that the answer of the appellants endeavors to raise these collateral questions, but the proceeding is only for the condemnation of the land specified and

the just compensation therefor by the instrument of appropriation and the decree is confined to these two subjects.

This appeal is not from the final order or decree in this proceeding. It is avowedly an appeal from what is no part of the decree and which in such proceeding could not be a part of such final order. It is an appeal from the omission from such order of things extraneous and irrelevant in the proceeding. Had the final order failed to limit the appellee's acquisition to the land described in the instrument of appropriation it would have been our duty to reverse it. If there be any mode in which the appellants may seek to compel the appellee to acquire the whole farm, this is not such mode. We may go further. If the appellants were not here estopped. If Brentwood road had been closed, the appellants claim these statutes require the appellee in that state of case to condemn the whole of the Patterson farm. The appellants' conclusion is based upon

"The provision of section 5 of the act of February 28, 1903, which covered the case of the closing of a street under any one of the three acts and which is as follows (32 Stat., 912):

"That no streets or avenues shall be closed or abandoned under the provisions of *this* act or of the acts *relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Company, approved February twelfth, nineteen hundred and one, until all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said acts, shall have been acquired by said railroad company* or companies or the terminal company referred to herein, either by condemnation or purchase, as hereinafter provided."

The provision just quoted must be considered in connection with section 1, of the act of February 12th, 1901, which provides: "that no portion of any street shall be closed under authority of this act until said railroad company shall have secured control of the property abutting upon said portion to be closed, it being the intent hereof that no property-owner shall be deprived of egress from or ingress to his property."

These two provisions of the two acts requiring the purchase or condemnation of property abutting upon streets or parts of streets, plainly applied to streets within the City of Washington, and to lots abutting upon such streets, and not to platted squares merely mapping the surface of farms. It was the intent of such provision to require the condemnation or purchase of property abutting upon streets in order that no property owner should be deprived of egress or ingress. These provisions authorizing the closing of open streets provide that streets shall not be closed until all the property on each side is acquired. Until the railroad shall acquire all the property, the streets remain open and the egress and ingress of the abutting owner is undisturbed. It is plain that these provisions do not apply to county roads whereby the railroad would be compelled to acquire farms on both sides. The Patterson farm of ninety acres, as appears by the plat in the record, abuts on Brentwood road from Florida avenue to New York avenue, on the former for several hundred feet, on the latter for several thousand feet, and by the intended relocation of Brentwood road near Florida avenue, its front on Brent-

wood road south of New York avenue is undisturbed. Congress intended that designated streets should not be closed, unless and until the railroad acquired the abutting property. Congress was solicitous to guard the access of house and lot owners to their property and not to require the railroad to acquire farms.

"The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question." United States *vs.* Gettysburg Electric Rwy. 160 U. S. 685.

These statutes do not plainly require the railroad company to take this farm or others abutting on county roads. As we understand the intent of Congress, it is not the duty of the Court to compel, the railroad company to acquire it. It nowhere appears in this record that the appellee as a common carrier has use for this farm. The appellants suggest no public use, the appellee, by this proceeding and by its counsel, denies that it needs this farm for any public use or for any use contemplated by Congress in these acts. Courts should be wary not to condemn private property for private use.

As was said in United States *ex rel.* Riley, *vs.* The Baltimore & Ohio Railroad Company, decided at the last term of this Court: "When the power to exercise the right of eminent domain is delegated to a railway company, the Courts will supervise the exercise of that power and restrain any clear case of abuse of the power. Should the Courts be asked to compel the railroad to condemn property for which it finds no public use, and when it is plain the property is not needed? Can Congress require a railroad to condemn a farm which is in no sense necessary for the use of the railroad? 'Private property cannot be taken for public use unless there is a necessity for such taking; for the taking of property when not at all necessary for a public purpose, or the taking of more property than is necessary for a given public purpose, is in effect a taking for private use. Randolph on Em. Dom. Sec. 185.' Atlantic Railroad Co. *vs.* Penny, 119 Ga. 481."

The final order or decree of the Court below must be affirmed, with costs, and it is so ordered.

Affirmed.

Wednesday, June 13th, A. D. 1906.

No. 1570. April Term, 1906.

FRANCIS WINSLOW, AUGUSTUS JAY, and AMERICAN SECURITY AND TRUST COMPANY, Trustees, and KATE LA MONTAGNE, HARRIET WINSLOW, and ELIZABETH P. PATTERSON, Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and on a motion

to dismiss which was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the final order or decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE McCOMAS,

June 13, 1906.

No. 1570.

FRANCIS WINSLOW, AUGUSTUS JAY, and AMERICAN SECURITY AND TRUST COMPANY, Trustees, and KATE LA MONTAGNE, HARRIET WINSLOW, and ELIZABETH P. PATTERSON, Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

On motion of Mr. W. G. Johnson, attorney for the appellants, It is ordered by the Court that an appeal and writ of error to remove this cause to the Supreme Court of the United States be, and the same are hereby, allowed, and the bond for costs on said appeal is hereby fixed at $300. and the bond for costs on said writ of error is hereby fixed at $300.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Francis Winslow, Augustus Jay and American Security and Trust Company, Trustees, and Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson, Appellants, and The Baltimore and Ohio Railroad Company, a corporation, Appellee, a manifest error hath happened, to the great damage of the said Appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 21st day of June, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

Know all men by these presents: That we, Francis Winslow, Augustus Jay and The American Security & Trust Company, Substituted Trustees under the Will of Catherine Pearson, deceased, and Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson, beneficiaries under said Will, as principals, and Charles J. Bell, of the District of Columbia, as surety, are held and firmly bound unto The Baltimore & Ohio Railroad Company in the full and just sum of three hundred dollars, to be paid to the said The Baltimore & Ohio Railroad Company, its certain attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals and dated this twentieth day of June, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Francis Winslow, Augustus Jay and The American Security & Trust Company, Substituted Trustees under the Will of Catherine Pearson, deceased, and Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson, beneficiaries under said Will, as appellants and the said The Baltimore & Ohio Railroad Company, as appellee, a judgment was rendered against the said Francis Winslow, Augustus Jay and The American Security & Trust Company, Substituted Trustees under the Will of Catherine Pearson, deceased, and Kate La Montange, Harriet Winslow and Elizabeth P. Patterson, beneficiaries under said Will and the said Francis Winslow, Augustus Jay and The American Security & Trust Company, Substituted Trustees under the Will of Catherine Pearson, deceased, and Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson, beneficiaries under said Will having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Baltimore & Ohio Railroad Company having been issued citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Francis Winslow, Augustus Jay and The American Security & Trust Company, Substituted Trustees under the Will of Catherine Pearson, deceased, and Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson, beneficiaries under said Will, shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea

good, then the above obligation to be void; else to remain in full force and virtue.

FRANCIS WINSLOW, *Trustee,* [SEAL.]
By WM. G. JOHNSON, *Attorney in Fact.*
AUGUSTUS JAY, *Trustee,* [SEAL.]
By WM. G. JOHNSON, *Attorney in Fact.*
AMERICAN SECURITY AND TRUST COMPANY,
By JAMES F. HOOD, *Secretary.* [SEAL.]
KATE LA MONTAGNE, [SEAL.]
By WM. G. JOHNSON, *Attorney in Fact.*
HARRIET WINSLOW, [SEAL.]
By WM. G. JOHNSON, *Attorney in Fact.*
ELIZABETH P. PATTERSON, [SEAL.]
By WM. G. JOHNSON, *Attorney in Fact.*
CHARLES J. BELL. [SEAL.]

Sealed and delivered in the presence of:—
OSCAR LUCKETT, as to all.

[Seal of American Security & Trust Company.]

Approved by
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

(Endorsed:) No. 1570. Francis Winslow *et al.*, Appellants, *vs.* The Baltimore and Ohio Railroad Company. Bond for Costs on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 21, 1906. Henry W. Hodges, Clerk. (Copy.)

UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Francis Winslow, Augustus Jay and American Security and Trust Company, Trustee, and Kate La Montague, Harriet Winslow and Elizabeth P. Patterson, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 21st day of June, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted June 22, 1906.

HAMILTON & COLBERT,
Attorneys for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 22, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages number from 1 to 96, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Francis Winslow, Augustus Jay and American Security and Trust Company, Trustees, and Kate La Montagne, Harriet Winslow and Elizabeth P. Patterson, Appellants, *vs.* The Baltimore and Ohio Railroad Company, a Corporation, No. 1570, April Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of June, A. D. 1906.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,298. District of Columbia Court of Appeals. Term No. 333. Francis Winslow, Augustus Jay, and American Security & Trust Company, trustees, *et al.*, plaintiffs in error, *vs.* The Baltimore & Ohio Railroad Company. Filed June 29th, 1906. File No. 20,298.

Office Supreme Court, U. S.
FILED
OCT 14 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 59.

FRANCIS WINSLOW ET AL., PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

WM. G. JOHNSON,
Counsel for Plaintiffs in Error.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 59.

FRANCIS WINSLOW ET AL., PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This case is brought here by writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court (Rec., pp. 78–9) affirming the judgment rendered by the Supreme Court of the District of Columbia (Rec., p. 57) in a proceeding brought by the Baltimore and Ohio Railroad Company against the plaintiff in error for the condemnation of land (Rec., pp. 2–6).

In this proceeding the Railroad Company sought to condemn a portion of the tract of land belonging to plaintiffs in error, as shown in their petition or instrument of appropriation (Rec., pp. 2–4), while the plaintiffs in error insisted that the Railroad Company was compelled, under the law to acquire the entire parcel of land belonging to plaintiffs in error (Rec., pp. 6–9).

The court overruled this contention of the plaintiffs in error (Rec., pp. 54–5), and by its final judgment affirmed the finding and award of the appraisers for the value of the land taken and for damages to that not taken and adjudged the fee in the land to the Railroad Company (Rec., p. 57).

There is no controversy over the facts in the case and the question of law presented by the record is simply whether the company is compellable, under the statutes, to take the entire tract or may lawfully limit its acquisition to so much only of the land as it may desire.

The land involved is situated on the northerly side of Florida avenue at its intersection by Delaware avenue and Brentwood Road, abutting on the northerly line of Florida avenue and the easterly line of Brentwood Road, and is bounded on the east by the lands of the Columbia Institute for the Deaf and Dumb, and on the north by land of the Real Estate Improvement Company, a corporation affiliated with the Baltimore and Ohio Railroad Company, which held the land for the use of the Railroad Company, and on the west by the Brentwood Road (Rec., pp. 6–7).

The portion of the land which defendant in error sought to acquire, in the proceeding, comprehends a strip of land about 385 feet long, fronting on the Brentwood Road, and cutting off all the rest of the property from all communication with that road (plat, Rec., p. 4), the Brentwood Road itself at this point being closed and actually used as the right of way of the Railroad Company (Rec., pp. 3, 4, 8, 21, 29, 30, 33–35, 37).

In its petition or instrument of appropriation, the Railroad Company seeks to obviate this consequence of its appropriation of the Brentwood Road and the strip of abutting land of the plaintiffs in error, by declaring in the instrument of appropriation its purpose in appropriating the land to be to use a portion of the land

taken for its right of way and another portion for the re-establishment and re-location of the portion of Brentwood Road on the westerly line of the remaining land of plaintiffs in error (Rec., pp. 2–3).

The plaintiffs in error insist in their answer that there is no power under the statutes to re-establish or re-locate this portion of the Brentwood Road and that by the terms of the acts of Congress this portion of the Brentwood Road must be permanently vacated, closed, and abandoned to public use, and that the Railroad Company is compellable to acquire all the land of plaintiffs in error abutting upon the portion of the road so closed (Rec., p. 8).

The proceedings are brought, as stated in the petition, under the authority of certain acts of Congress relating to the abolition of grade-crossings and to the establishment of a union railroad station in the District of Columbia (Rec., pp. 2–3). For the convenience of the court all of these acts of Congress are printed in full in the appendix to this brief, and as the question presented by this record is wholly one of the proper construction and application of these acts of Congress, it is believed a brief statement of their general purport and effect will aid in reaching a proper appreciation of the facts of the case.

On the 12th of February, 1901, two acts of Congress were approved, the one [31 Stat., pp. 767–774; appendix, pp. 17–32] relating to the Baltimore and Potomac Railroad and the other [31 Stat., pp. 774–781; appendix, pp. 3–17] relating to the Baltimore and Ohio Railroad.

These acts provided for separate routes of entrance into the city and for separate railway stations for the two roads in different sections of the city. Each act defined distinctly and specifically the route of the road to which it referred, designating the exact location of the tracks and the width of the right of way and enacted

that portions of certain public highways in the District, both within and without the city limits, involved in the scheme of the acts should be "completely vacated and abandoned by the public and closed to public use."

These acts further provided that none of these highways should be closed or abandoned until all of the property abutting on them should be acquired by the respective companies who were authorized to condemn such land.

Before any proceedings were instituted against plaintiffs in error under these acts of Congress, another act was passed, approved February 28th, 1903 [32 Stat., Pt. I, pp. 908–918; Appendix, pp. 32–52], by which the scheme of two separate railway stations in different sections of the city was repealed and a site for a common or union station for all the roads, in a location different from either of those for which previous provision had been made, was established and a railway station directed to be built thereon.

This act necessarily involved a change in the previously prescribed routes of entrance into the city and a different area of railroad occupation, the restoration to public use and status, as public highways, of certain portions of the public highways theretofore closed and abandoned, and the closing and abandonment to public use of certain other portions of the public highways which had not been affected by the previous legislation.

This last act of Congress contained the following provision:

> "That no streets or avenues shall be closed or abandoned under the provisions of this act or of the acts relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, until all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said acts, shall have been

acquired by said railroad company or companies or the terminal company referred to herein, either by condemnation or purchase, as hereinafter provided."

32 Stat., Pt. I, p. 912; Appendix, p. 40.

In this state of the legislation the Baltimore and Ohio Railroad, on the 22d of August, 1904, began these proceedings by filing in the Supreme Court of the District of Columbia, holding a District Court of the United States, its "Instrument of Appropriation," in which it sought the condemnation of the part of the land of plaintiffs in error hereinbefore mentioned (Rec., pp. 2–5).

The plaintiffs in error answered, setting up their objections to the project of the Railroad Company, denying its right to acquire less than the whole of their lands abutting on the Brentwood Road and denying its right to re-establish or re-locate the portion of the Brentwood Road and insisting that said Brentwood Road was permanently to be abandoned and closed to public use (Rec., p. 8).

These objections were overruled and exceptions taken on the 18th of October, 1904, and a bill of exceptions, thereafter, duly signed by the court (Rec., pp. 54–5).

Thereupon the company proceeded to the condemnation of the portion of the land designated in its petition or instrument of appropriation and the appraisers rendered their award allowing $35,392.50 for the land taken and $10,000 for the damage occasioned to the residue of the tract (Rec., pp. 13–14).

On the 19th of April, 1905, plaintiffs in error withdrew all their objections to the proceeding except those against the company's right to acquire less than the whole land and against the company's right to keep open by re-location or otherwise, the portion of the Brentwood Road (Rec., p. 56).

The Railroad Company paid into court the entire sum awarded by the appraisers both for the land and damages ($45,392.50) (Rec., p. 57), and the court by its final judgment entered April 20, 1905, confirmed the said award and adjudged that—

> "the *fee simple title* to the land in the petition and instrument of appropriation particularly described, be, and the same is hereby vested in the said petitioner, the Baltimore and Ohio Railroad Company" (Rec., p. 57).

On the same day, on motion of plaintiffs in error, the court by its order directed payment, by the clerk, to plaintiffs in error of the sum of $35,392.50—

> "the amount of the appraised value of the land of the respondents described in the instrument of appropriation herein as fixed by the return of the appraisers herein" (Rec., p. 57).

Thereafter, on April 27, 1905, plaintiffs in error appealed to the Court of Appeals—

> "from so much of the decree of April twentieth, 1905, confirming the return and award of the appraisers herein as fails to require the petitioner, the Baltimore & Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation" (Rec., p. 58).

A motion was made in behalf of the Railroad Company to dismiss this appeal (Rec., pp. 61–2), which was heard with the hearing on the merits (Rec., pp. 62–3), and granted by the court (Rec., p. 63) but, on motion for rehearing, the judgment of dismissal was set aside by the court (Rec., pp. 63–4), and the judgment of the court below was finally affirmed on the merits (Rec., pp. 78–9), and this writ of error sued out (Rec., pp. 79–80).

Assignment of Errors.

1. The court erred in not requiring the petitioner, the Baltimore and Ohio Railroad, to acquire in these proceedings the entire tract of land in the answers described.

2. The court erred in holding that the petitioner, the Baltimore and Ohio Railroad Company, could keep open to public use, as a highway, any portion of the Brentwood road, which was directed to be closed by the acts of Congress.

3. The court erred in holding that the petitioner, the Baltimore and Ohio Railroad, had the right to deflect any portion of the Brentwood Road over the lands of plaintiffs in error or otherwise.

4. The court erred in holding that the petitioner, the Baltimore and Ohio Railroad Company, had the right to cut off any part of the Brentwood Road upon which lands of plaintiffs in error abut, until said petitioner had acquired all of the land abutting on said road.

ARGUMENT.

The question to be determined upon this writ of error is simply whether the Baltimore and Ohio Railroad Company is compelled by the statutes, to acquire the entire tract of land described in the answer, or whether it may limit its acquisition to a portion arbitrarily selected by itself.

The answer to this question is not to be resolved from any principles of general law, but is to be found in the terms of the acts of Congress which prescribed a general scheme of railroad improvement for the use of the Capital of the United States without reference merely to the

particular needs of the railroads in the conduct of their business. By these acts Congress not only defined the routes of the road, the location of tracks, stations, freight yards, round houses and other railroad appurtenances and the amount of land for railroad occupation, but it also required that portions of certain highways, not actually used or permitted to be used for railway purposes should be closed, vacated and abandoned to public use as highways, and prohibited the opening of other highways theretofore authorized by law.

For the execution of this scheme it required the railroad companies to acquire lands without reference to any railway use to be made of the same, but in order to carry out the general plan of improvement determined upon, and for which the acts of Congress appropriated, for the use of the railroad companies, in aid of the enterprise, three millions of dollars.

The question, therefore, is not how much of this land was required for railway uses, but was its acquisition demanded by the terms of the acts of Congress for the execution of the scheme adopted by Congress. To determine how much of this land was to be taken, recourse must be had to the terms of the acts of Congress, to the plan enacted by them, and to the scheme and manner of its execution therein defined and described.

In the case of Shoemaker *vs.* U. S., 147 U. S., 282, this court says (p. 298):

> "While the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made."

And in U. S. *vs.* Gettysburg, etc., Ry., 160 U. S., 668, this court says (p. 685):

> "The use for which the land is to be taken having been determined to be a pubic use, the quantity which should be taken is a legislative and not a judicial question."

The plaintiffs in error contend that the company is compelled to acquire the entire tract because (1) by the specific terms of the acts of Congress, the portion of the Brentwood Road upon which the land of appellants abuts is required to be closed and vacated as a public road; and because (2) by the specific terms of the act of Congress it is made the duty of the Railroad Company as a condition to the closing of the road that it acquire all the property abutting on the road.

Congress might have permitted or required the closing of public highways and the acquisition of portions of parcels of land abutting thereon, leaving the consequence of such acts upon abutting or remaining lands to be determined judicially as a matter of compensation. The question then would have been, as said by this court in U. S. *vs.* Gettysburg, etc., Ry. Co. (*supra*) "a question of the amount of compensation." But in these acts Congress has pretermitted any such inquiry and has specifically required the companies to acquire the entire land abutting upon any highway directed to be closed.

I.

The Legislation of Congress is Mandatory That the Brentwood Road Shall be Vacated, Abandoned by the Public, and Closed to Public Use.

By the acts of Congress approved February 12, 1901 (31 Stat., 774, Appendix, pp. 3–17), and February 28, 1903 (32 Stat., 909, Appendix, pp. 32–52), enacted

for the expressed purpose of abolishing grade-crossings by railroads in the District of Columbia, and for the establishment of a union station, the precise location of the new tracks of the Baltimore and Ohio Railroad Company from the union station to the north side of Florida avenue is definitely fixed, by a specifically prescribed route. This route is somewhat changed, by the later act, which placed the terminal or station on Massachusetts avenue instead of C street, as prescribed in the earlier act. From H street north, however, both statutes require that the tracks shall be carried upon a viaduct built in the bed of Delaware avenue, so as to occupy the whole of Delaware avenue lying west of the eastern forty feet thereof, and to continue on that line along Delaware avenue to the north side of Florida avenue, which latter is to be crossed by a bridge. From the north side of Florida avenue the tracks are required to proceed in a general northeasterly direction to Winthrop Heights.

In order correctly to understand the nature and requirements of the legislation of Congress upon this subject, it is important to understand the actual position of the route adopted by Congress within the area affected, as disclosed by the record.

The plats filed in the case (Rec., pp. 4, 8) show that the intersection of Florida avenue by Delaware avenue and by the Brentwood Road are coincident and indistinguishable, except that Deleware avenue, being wider than Brentwood Road, traverses a greater area of Florida avenue. The west line of Brentwood Road, at its junction with Florida avenue, is, however, seen to be coincident with and a continuation of the west line of Delaware avenue, so that the necessary effect of the provisions of the act of Congress is to place the tracks of the Railroad Company directly upon the bed of the Brentwood Road.

The plat filed with the instrument of appropriation

(Rec., p. 4), the terms of the instrument of appropriation itself describing the land required (Rec., p. 3), and the testimony of the company's engineers show that the whole of the Brentwood Road, between Florida avenue and Third street, together with an adjacent and abutting portion of land of plaintiffs in error on the east side of the Brentwood Road is to be actually occupied by tracks (Rec., pp. 29, 30), and is required for the purposes of the company's right of way (Rec., p. 37).

The testimony of the company's engineer also shows that the roadbed of the company, carrying its tracks, will, at this point, extend entirely across the Brentwood Road and to a point at least 15 feet west of the west line of the Brentwood Road (Rec., p. 21).

The record also shows, through the testimony of the company's engineer, the further route of the road as it proceeds northeasterly from Florida avenue and that it again crosses and occupies the bed of Brentwood Road at the intersection of New York avenue and Fourth street and that Brentwood Road, from New York avenue northward, is closed and obliterated (Rec., pp. 33, 34, 35).

It is, therefore, a demonstration, from the record, that the scheme adopted by Congress, necessarily and in fact, involves the actual occupation, by the Railroad Company, of the southern outlet of the Brentwood Road where it communicates with the city, being the portion lying between Florida avenue and Third street, upon which the lands of plaintiffs in error abut, together with private property on both sides of said road, and that the Brentwood Road is also occupied by the tracks of the company at the point where it touches the northern boundary or corner of the land of plaintiffs in error at New York avenue and Fourth street.

It is obvious, therefore, that a necessary part of the execution of the plan adopted by Congress involved the actual closing of the portions of the Brentwood Road

above indicated, and their use for the bed of the railroad tracks and for the company's right of way, and, also, by cutting the road off from communication with the city at both Florida and New York avenues, rendered that portion of Brentwood Road useless to the community as a highway or means of communication with the city, and absolutely useless to plaintiffs in error, as it is cut off at both ends of the their land and has no outlet either north or south.

The purpose of the statutes being to eliminate grade crossings, while at the same time establishing a union station in the central part of a rapidly expanding city, beyond whose original boundaries a definite plan of street extension had aleady been established by law, it became an essential feature of the statutes to define the manner in which grade crossings were to be eliminated in every instance where an existing or projected street should intersect or coincide with the route established for the railroad. It is manifest that the elimination of grade crossings could only be accomplished by carrying the streets over or under the railroad, deflecting or changing the lines of the streets, or vacating or abandoning them altogether. Upon an examination of the statutes, it will be found that Congress has designated, *in every instance*, which streets should be carried over, which streets should pass under the railroad, which streets should be deflected or changed in line, and which streets should be vacated and abandoned and closed to public use, and that, in that designation, Brentwood Road, from Florida avenue to the west line of Seventh street east, is required to be closed, vacated, and abandoned to public use.

Thus section 3 of the act of February 12, 1901, provides as follows (31 Stat., 775; App., pp. 5–6):

> "That to accomplish the purposes of this act the following-named streets in the subdivision of

Eckington east of the right of way of the Metropolitan Branch of the Baltimore and Ohio Railroad Company, *shall be completely vacated and abandoned by the public and closed to public use*, namely: Q, R; Third, between New York avenue and Florida avenue; Fourth, Fifth, and Randolph streets; S and Seaton streets west of Sixth street, and Sixth street south of U street, and Seventh street between New York avenue and Brentwood Road *shall not be opened. The Brentwood Road shall also be closed between S street and Florida avenue.* New York avenue and Florida avenue *shall be carried under said railroad*, as provided in the first section of this act. T and V streets *shall be carried under by a subway, or over* the Metropolitan Branch Railroad *by a bridge or viaduct.*"

Section 5 of the act of February 28, 1903, provides as follows (32 Stat., pp. 912–13; App., p. 40):

"That to accomplish the purposes of this act the following-named streets, *in addition to the streets vacated, abandoned, and closed* by the provisions of said act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one, *are hereby vacated, abandoned, and closed*, to wit: In Eckington T street *shall be closed* between the west line of Seventh street and the right of way of the Metropolitan branch of the Baltimore and Ohio Railway Company; Thomas street from the west line of Seventh street westward; Seaton street from Sixth street to Seventh street; S street from Sixth street to the Brentwood Road; *Brentwood Road from the west side of Seventh street to the south side of S street;* Third street from the south side of R street to Florida avenue; Quincy street *shall be closed and abandoned.* . . .

"No streets or avenues, except Ninth, Twelfth, and Fifteenth streets and New York avenue *shall be opened across the railroads* constructed under

> authority of this act, between Florida and Montana avenues; and said Ninth, Twelfth, and Fifteenth streets, when and as opened, *shall be carried above* the railroads by suitable viaduct bridges."

It will be noticed that the language used in these statutes is clear, unambiguous, and mandatory, and vests no one with any discretion. The act of 1901 declares that the portion of the Brentwood Road and other streets there designated, "*shall be completely vacated and abandoned by the public and closed to public use,*" and the act of February 28, 1903, declares that the portion of the Brentwood Road and other streets therein mentioned "*are hereby vacated, abandoned, and closed.*"

So, the act relating to the Baltimore and Potomac Railroad, approved February 12, 1901 (31 Stat., 769; App., p. 22), in the seventh section, directing the closing of certain streets, uses similar language, "*completely vacated and abandoned to public use.*"

The language of these statutes not only declares these streets shall be "closed," but also requires that they be "*abandoned* by the public and *closed to public use,*" which discharges the municipality from all responsibility for the care and supervision of the streets, and takes from it all rights of control or otherwise, arising from the public interest in them as public highways.

Furthermore, the third section of the act of February 12, 1901, relating to the Baltimore and Ohio Railroad, and the fifth section of the act of February 28, 1903, both provide that:

> "The Commissioners of the District of Columbia are hereby authorized and *directed* to cause all streets, avenues, ways, and alleys *to be closed*, as provided in this act and in accordance with the intent thereof" (31 Stat., 776, App. p. 7; 32 Stat., 913, App., p. 42).

Thus, in addition to the positive declaration that the streets be closed also, *commanding* the Commissioners of the District of Columbia to carry out the will of Congress by causing the streets to be closed.

No other or different language is employed with respect to any other streets or avenues directed to be closed than is used with respect to Brentwood Road, all the streets directed to be closed being grouped together under the one phrase, and even the portion of Delaware avenue on which the viaduct is directed to be built is by the fifth section of the act of February 28, 1903, embraced by the same phrase, "hereby vacated, abandoned, and closed."

The statutes themselves furnish inherent evidence that Congress was fully aware of the effect of the positive terms employed with respect to the closing of streets, and fully understood the effect of that language to be the utter destruction, as public highways, for all purposes, of the streets or portions of streets directed to be closed. Thus, as shown by the plats in the record (Rec., pp. 4, 8), portions of Third street and of Brentwood Road directed to be closed, intersect, and form part of the bed of New York avenue at those intersections. The fifth section of the act of February 28, 1903, therefore provides that:

> "Nothing contained in the provisions heretofore made for the vacating of Third street and Brentwood road across said avenue shall operate to close said avenue in any way as a public thoroughfare at its full established width" (32 Stat., 913, App., p. 41.)

Can it be that such a provision was necessary if Brentwood Road and Third street were not to be closed?

Again, in the same section of the same act is found the following:

> "That the provisions of section three of the

> act of February twelfth, nineteen hundred and one, in relation to new terminals for the Baltimore and Ohio Railroad Company, *which vacate, abandon, and close* D and E streets, between First street and North Capitol street, and Delaware avenue, between C street and the south line of Massachusetts avenue, be, and the same are hereby, repealed, and said streets *are restored to the same status* and ownership in all respects as they were prior to the passage of said act." (32 Stat., 914, App., p. 43.)

If the statute had not effectually closed and abandoned these streets why this enactment? If their "status" as public highways had not been destroyed by the previous act, how could that "status" be restored?

So the seventh section of the act of February 12, 1901, relating to the Baltimore and Potomac Railroad, after declaring that certain streets therein named shall be "completely vacated and abandoned for public use," contains a proviso that:

> "Nothing herein contained shall be construed to prohibit the public authorities *from entering upon vacated and abandoned streets and avenues* for the purpose of locating, constructing, maintaining, or repairing therein sewers, water mains, gas mains, conduits, or other underground construction necessary for the public comfort, convenience, or health" (31 Stat., 769, App., p. 23).

Why this proviso, if the effect of the statute was not to close and abandon the streets, as public highways, for all purposes, but for the proviso?

It is respectfully submitted that none of the statutes relating to this subject contain any term or phrase in anywise qualifying the absolute and mandatory requirement that the portion of the Brentwood Road in controversy be "completely vacated and abandoned by the public and closed to public use."

The record shows that in the execution of the statute the Railroad Company treated this provision of the statute as mandatory with respect to every street and every part of the Brentwood Road mentioned in the act except the part in controversy.

The plat (Exhibit No. 2, Rec., pp. 36–7) shows the area described in section 3 of the act of February 12, 1901 (31 Stat., 775, App., pp. 5–7), as the subdivision of Eckington, east of the Metropolitan Branch of the Baltimore and Ohio Railroad, and the record further shows that every street in that area directed to be closed by the acts of Congress has been closed and that all of the Brentwood Road has been closed from Seventh street east to Florida avenue, with the exception of the fragment of the road lying between New York avenue and Third street east (Rec., pp. 38–9) upon which the lands of plaintiff's in error abut.

It is submitted that the act contains no provision upon which the company can justify this arbitrary exception.

The Attempted Deflection of Brentwood Road.

As shown by the terms of the petition or instrument of appropriation, the Railroad Company, instead of pursuing the plain terms of the statute, by acquiring the land of the plaintiffs in error and then closing that portion of the Brentwood Road upon which it abuts, has resorted to the expedient of seeking to acquire a part only of the land, and out of that part to carve a strip sufficient in width to effect a continuation of the fragment of Brentwood Road from Third street to Florida avenue (Rec., p. 3, plat, Rec., p. 4), with the avowed object that the same may be kept open as a public highway in defiance of the act of Congress.

For this deflection of the road an impossible inclined plane is offered, bounded upon one side by the high

bank of the company's roadbed with its tracks (Rec., pp. 36–38).

An engineer's diagram of this interesting specimen of a public highway for the private use of one piece of property is found in the record (Exhibit 1, Rec., p. 36).

It is submitted that for this course of procedure no warrant can be found in the statute.

As already shown, the provision of the statute is not that the road shall be closed *or deflected*, but that it shall *be closed.*

The only authority found in either statute for deflecting any roads is an authority given *to the Commissioners of the District*, the head of the municipality, which is responsible for all public highways within the District and not to the Railroad Company, and is confined to *streets not required to be closed.*

Thus, the third paragraph of the third section of the act of February 12, 1901, is as follows (31 Stat., 776, App., p. 7):

> "The Commissioners of the District of Columbia are hereby authorized and directed to cause all streets, avenues, ways, and alleys to be closed as provided in this act and in accordance with the intent thereof; *and also* to make such changes in the existing lines and grades of any street, avenue, or way as may be reasonably required, deemed necessary, or advisable in the construction of the works hereby authorized."

This, it is seen, is not an authority in the alternative, to close streets *or* change their lines or direction, but a positive command to *close* the streets directed to be closed and an authority to change the grade or lines of others.

So, the second paragraph of the seventh section of the same act provides that:

> "All work of construction authorized by this

> act which shall affect in any way the existing streets or avenues of the city or District *not hereby abandoned and closed*, shall be done to the satisfaction and subject to the approval of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance thereof" (31 Stat., p. 778, App., p. 10).

Again, in the twelfth section, authority is given to construct a branch road north of Winthrop Heights, and in connection with that enterprise if any highway is to be crossed the section provides that (31 Stat., 781, App., pp. 16–17):

> "Every such highway crossing shall be either over or under grade, where practicable without increasing the grades on said railroad, or causing unreasonable expense in construction; and for the purpose of avoiding grade crossings *the Commissioners of the District of Columbia shall be fully authorized* and empowered to change the grade of any such public highway, so as to pass the same over or under said railroad, and *to deflect or divert any such highway*, so as to pass over or under said railroad at a different point of crossing, and to close so much of the said highway as is abandoned."

So, in the provisions of the fifth section of the act of February 28, 1903, relating to the Massachusetts avenue plaza, authority is given *to the Commissioners of the District* (32 Stat., 914; App., p. 42)—

> "to make such changes in the lines and grades of any existing street, avenue, or way, and in the recorded plans of street extensions, as may be reasonably required, deemed necessary or advisable in the construction of the works hereby authorized."

It is, therefore, manifest that in the important matter of changing the line or grade of public highways, where authorized at all, the Railroad Company is given no authority whatsoever, but, on the contrary, the propriety and character of any such changes are placed, exclusively, where they properly and exclusively belong, with the municipal authorities having control of and being responsible for public highways.

The only other statute relating to this subject is embraced in sections 648 to 663, both inclusive, of the revised statutes relating to the District, which are made applicable to these condemnation proceedings by section 10 of the act of February 12, 1901 (31 Stat., 771; App., p. 26), section 11 of the act of February 12, 1901 (31 Stat., 780; App., p. 15) and section 9 of the act of February 28, 1903 (32 Stat., 916; App., p. 48).

An examination of these sections will show that they have no relevancy to this subject.

It is respectfully submitted that the plain terms of the several acts of Congress positively declared that this portion of Brentwood Road should be closed, vacated and abandoned to public use and that there is no authority conferred upon the Railroad Company to deflect or re-locate a fragment of this highway and continue the same in use as a public highway when the act of Congress has explicitly declared that it shall be closed and abandoned.

It is further respectfully submitted that the attempt of the Railroad Company in this case to deflect this fragment of the Brentwood Road and change its grade is an act of usurpation of an authority not granted by Congress either to the Railroad Company or to any one else, and can not operate to relieve the company from the obligations imposed upon it by the act of Congress.

To admit that the railroad companies could either close or deflect at pleasure, highways which Congress

enacted should be closed would enable the companies to nullify the entire plan prescribed by the several acts of Congress and substitute therefor such twisting and turning of highways as might best relieve them of obligations without any reference to the public convenience or the execution of the plan so specifically prescribed by the legislature.

II.

By the Terms of the Act of Congress the Company is Obliged to Acquire the Entire Tract of Land Abutting on the Brentwood Road.

It has been already shown that, as matter of law, the Brentwood Road is required to be closed and that the provision of the statute is mandatory and not discretionary. It has also been shown, as matter of fact, that for all practical purposes the road has been closed and is no longer an existing highway.

Independently of the claim made in the answer of plaintiffs in error that they are the owners in fee of the portion of the Brentwood Road involved in these proceedings (Rec., p. 7), it is conceded that their land abuts upon that public highway.

This easement is property of which they can not be deprived without just compensation any more than they can of the land abutting on the road.

Pumpelly *vs.* Green Bay, &c., Co., 13 Wall., 166.
Bridge Co. *vs.* U. S., 105 U. S., 470.
Dana *vs.* Ry. Co., 7 App. D. C., 492–496.
Pearsoll *vs.* Board of Supervisors, 74 Mich., 558.
Lewis Em. Dom. (2d ed.), sec. 134, p. 324.

The question then arises, how are they to be compensated? Is it by money damages for the loss of this easement or must the railroad acquire and pay for all the land abutting on the road and assume their position?

The court below held the former and confirmed the award which, in addition to allowing $35,392.50 for the land taken, allowed $10,000 for damages resulting to the remainder. In this it is claimed that the court erred, because Congress directed that instead of inflicting and paying for such damage the Railroad Company should acquire and pay for the land and take the owner's place.

That Congress understood the practical effect of the plan which it adopted and directed to be executed, is apparent from the details of the plan given in the act itself and the reference, made in the act, to the approved plan of the entire scheme signed by the companies and on file in the office of the Commissioners.

It is incredible to suppose that Congress could have entered into the details of all the streets in the neighborhood of the property selected, which were to pass over, and which under, and which to be closed, in ignorance of the effect that plan would have upon adjacent and abutting land. But whether it did or not know the facts, and whether it acted wisely or unwisely, it did unquestionably specify that the Brentwood Road was to be closed and that the abutting land was to be acquired by the company.

The provision of section 5 of the act of February 28, 1903, which covered the case of the closing of a street under any one of the three acts is as follows (32 Stat., 912; App., p. 40):

> "That no streets or avenues shall be closed or abandoned under the provisions of *this* act or of the acts *relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one* until *all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said acts, shall have been acquired by said railroad company* or companies or the terminal company referred to

herein, either by condemnation or purchase, as hereinafter provided."

Here is a plain and distinct enactment which puts upon the Railroad Company the positive duty to acquire the land abutting upon the road as a condition to the exercise of the right and duty to close the road.

It is submitted that the court had no authority to substitute for the course prescribed by Congress the estimation of damages to the land from the closing of the road, but that it should have pursued the statute and ordered the condemnation of the entire tract.

The Court of Appeals, in its opinion, says (Rec., p. 77):

> "These two provisions of the two acts requiring the purchase or condemnation of property abutting upon streets or parts of streets *plainly applied to streets within the City of Washington, and to lots abutting upon such streets*, and not to platted squares merely mapping the surface of farms."

There are three answers to this view of the learned court below:

1. An examination of the three acts of Congress will show that all the streets, avenues, roads, ways, and highways of every description are classed together without any discrimination as to whether they are within or without the city limits.

2. The closing of a highway and consequent injury to abutting property would be of precisely the same character whether the property were urban or rural, the extent of the injury being dependent upon local conditions and might be greater in a given case of rural property than in a given case of urban property.

Why would Congress be solicitous to protect the one and make no provision for the other?

3. A reading of section five of the act of February 28,

1903, will show, it is deferentially and respectfully submitted, that the learned court below is entirely in error. That section is as follows (32 Stat., 912; App., p. 40):

> "That to accomplish the purposes of this act the following-named streets, in addition to the streets vacated, abandoned, and closed by the provisions of said act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one, are hereby vacated, abandoned, and closed, to wit: In Eckington T street shall be closed between the west line of Seventh street and the right of way of the Metropolitan Branch of the Baltimore and Ohio Railway Company; Thomas street, from the west line of Seventh street westward; Seaton street, from Sixth street to Seventh street; S street, from Sixth street to the Brentwood Road; *Brentwood Road, from the west side of Seventh street to the south side of S street;* Third street, from the south side of R street to Florida avenue; Quincy street shall be closed and abandoned: *Provided,* that no streets or avenues shall be closed or abandoned under the provisions of *this* act or of the acts *relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one,* until *all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said acts, shall have been acquired by said Railroad Company* or companies or the terminal company referred to herein, either by condemnation or purchase, as hereinafter provided."

An examination of the plats in the record will show that of the *seven* highways specifically named and directed to be closed in the foregoing section, *not one is within the city of Washington,* and yet the direction of Congress that they be closed is immediately followed by the proviso requiring the company to acquire by purchase or condemnation the property abutting thereon.

It may have been wiser had Congress made an exception in the case of large tracts of land; but that exception, it is submitted, can not be supplied by judicial interpolation, especially in the case of a tract of land which is bounded on two sides by the railroad, and whose owners are, by the express terms of the statute, forbidden to open streets through their land across the railroad.

The Question of Estoppel.

In its opinion (Rec., pp. 74–77) the court below apparently considers plaintiffs in error estopped from objecting to the judgment because they have accepted so much of the fund as was allowed for the land taken. The court says (Rec., p. 76):

> "The appellee had paid into the registry of the court the sum of $45,392.50, the full amount of such appraisement and award, and the court further decreed that the fee in the land described in the petition and instrument of appropriation became vested in the appellee.
>
> "It appears to us that this proceeding was entire and not separable, that *the matter litigated was a single matter, that the fund here was but one fund,* and in our opinion the acceptance of the money received by the appellants should be held an estoppel upon their right of appeal."

In this it is submitted the learned court below erred.

The answer of the plaintiffs in error to the petition of the Railroad Company avers as follows (Rec., p. 8):

> "Further answering these respondents say that they are advised and believe and therefore charge that the said Railroad Company is not authorized under the law *to acquire any lesser portion of the land of these respondents abutting on the Brentwood Road than the whole of said land as prescribed in the said acts of Congress,* and that the attempt of the said Railroad Company by its instrument of appropriation herein to select for

condemnation an arbitrary part of said tract is unauthorized, null, and void.

"Further answering these respondents say that the declared purpose of said Railroad Company in said instrument of appropriation to use a portion of the land so arbitrarily selected by it *for the purpose of deflecting and continuing Brentwood Road from its present location through the said parcel of land attempted to be condemned is ultra vires* and void. That the said Railroad Company is not authorized by any law to lay out or create public highways within the District of Columbia other than its own public right of way, and that it is not empowered to repeal the acts of Congress declaring the said Brentwood Road to be closed and forever abandoned as a public highway, and to re-locate and re-establish said Brentwood Road as a public highway in defiance of the acts of Congress referred to."

A reference to the sections of the statute regulating these condemnation proceedings (sections 648-663; App., pp. 61-64), will show that the proceedings are informal and that no form of pleadings are provided for. The objection was distinctly made in the answer to the claimed right of the company to acquire a part only of the land, and its obligation to acquire all was also insisted upon. The award was in distinct parts; a specific sum $35,392.50 for the land taken, and $10,000 for damages to the residue (Rec., p. 14), and the plaintiffs in error only accepted the former sum (Rec., p. 57), the $10,000 remaining in the registry of the court, and the order of the court directing payment recognized this segregation of the fund and treated the part of the fund directed to be paid as "the amount of the appraised value of the land" (Rec., p. 57).

It is respectfully submitted that the acceptance of the fund allowed for the land actually taken is not inconsistent with the claims of the obligation of the company also to acquire and pay for the residue.

Regularity of the Appeal.

The court below, in its opinion, suggests some defect in the appeal taken to that court, saying (Rec., pp. 76--77):

> "We find in this record no judgment other than the final order of the court confirming the award upon a proceeding under the petition for appropriation of the land taken. It is true that the answer of the appellants' endeavors to raise these collateral questions, but the proceeding is only for the condemnation of the land specified and the just compensation therefor by the instrument of appropriation and the decree is confined to these two subjects.
>
> "This appeal is not from the final order or decree in this proceeding. It is avowedly an appeal from what is no part of the decree, and which in such proceeding could not be a part of such final order. It is an appeal from the omission from such order of things extraneous and irrelevant in the proceeding."

It is not suggested, in the court's opinion, that under the statute anything more formal than the objections and insistence of the answer was necessary, and the court apparently ignores what the bill of exceptions shows, namely, that the cause came on for hearing upon the petition and answer and amended answer, was argued by counsel and considered by the court.

> "Whereupon all the objections raised by the respondents in their said answer and amended answer, were by the court on the 18th day of October, 1904, overruled, to which ruling in this behalf respondents by their counsel then and there excepted" (Rec., p. 54).

When, thereafter, the court entered a final order allowing the company to take a part of the land only and

vesting in it the fee in that part, it finally denied the right of the plaintiffs in error, sustained the claims of the company to condemn a part of the land only and from that ruling the plaintiffs in error appealed.

It is respectfully submitted that the judgment of the court below should be reversed and the case remanded with instructions to remand the same to the Supreme Court of the District, there to proceed to the condemnation of the remainder of the land.

WM. G. JOHNSON,
Counsel for Plaintiffs in Error.

APPENDIX.

FULL TEXT OF ACTS OF CONGRESS OF FEBRUARY 12, 1901, AND FEBRUARY 28, 1903, RELATING TO ABOLITION OF GRADE CROSSINGS AND ESTABLISHMENT OF UNION STATION AND OF THE SECTIONS OF THE REVISED STATUTES RELATING TO THE DISTRICT OF COLUMBIA, REFERRED TO THEREIN.

LEGISLATION.

The following presents the full text of all the legislation by Congress involved in this proceeding and all the statutory authority invoked by the courts below:

CHAP. 354. AN ACT TO PROVIDE FOR ELIMINATING CERTAIN GRADE CROSSINGS OF RAILROADS IN THE DISTRICT OF COLUMBIA, TO REQUIRE AND AUTHORIZE THE CONSTRUCTION OF NEW TERMINALS AND TRACKS FOR THE BALTIMORE AND OHIO RAILROAD COMPANY IN THE CITY OF WASHINGTON, AND FOR OTHER PURPOSES. [31 STAT. U. S., PP. 774–781.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Baltimore and Ohio Railroad Company, and the terminal company incorporated as provided in this Act, be, and each of them is hereby, empowered and authorized to locate, construct, maintain, and operate new terminals and new lines of railroad to accommodate the traffic of the said Baltimore and Ohio Railroad Company, in connection with its Washington Branch Railroad and Metropolitan Branch Railroad within the District of Columbia and in the city of Washington, as hereinafter provided. The said new terminals and terminal tracks shall occupy the streets, avenues, public reservations, and property belonging to the United States, and such of the lands and property belonging to others as may be acquired by either of said companies, situate and lying within the area bounded as follows, to wit: Beginning at the intersection of the south line of H street north and a line forty feet from the east building line of Delaware avenue and parallel thereto; thence along said line parallel to the easterly building

line of Delaware avenue and forty feet therefrom to the west line of First street east; thence by said west line of First street east to the north line of C street north; thence by said north line of C street north to the east line of North Capitol street; thence north by said east line of North Capitol street to the south line of Massachusetts avenue; thence by a straight line to the intersection of the west line of First street east and the south line of H street north; thence to the point of beginning, or so much of this area as may be found to be necessary for proper terminal facilities and agreed upon between the Baltimore and Ohio Railroad Company and the Commissioners of the District of Columbia: *Provided*, That no portion of any street shall be closed under authority of this Act until said railroad company shall have secured control of the property abutting upon said portion to be closed, it being the intent hereof that no property owner shall be deprived of egress from or ingress to his property.

The main lines of railroad connecting said new terminals and terminal tracks with the present lines of railroad of said Washington Branch and said Metropolitan Branch shall be located as follows: From the south side of H street said lines shall run by a masonry viaduct of width sufficient for five tracks, but not exceeding in width eighty feet, with such turn-outs and sidings to adjoining property as may at any time hereafter be constructed under the authority of this Act, northerly along the middle of Delaware avenue to the north line of M street; thence northerly still in Delaware avenue, with five main tracks, but with the right to locate and construct sidings in Delaware avenue to and into adjoining property, including all of square numbered seven hundred and forty-eight, and crossing Florida avenue overhead by means of a two-span plate-girder bridge, or by masonry arches, to the north side of Florida avenue;

thence by diverging lines crossing over New York avenue by means of a two-span plate-girder bridge or bridges over the same, or by masonry arches; the one line, with two or more tracks, by the most practicable route in a general northeasterly direction, to a point of connection with the present tracks of the Washington Branch Railroad north of Winthrop Heights Station, and the other line, with two or more tracks, in a northerly direction by the most practicable route, to a point of connection with the present tracks of the said Metropolitan Branch Railroad at or near Rhode Island avenue extended.

SEC. 2. That said companies be, and each of them is hereby, authorized and empowered to locate, construct, maintain and operate, outside of the city limits and south of V street, yard tracks, switches, roundhouses, shops, and other structures necessary or proper for the accommodation of locomotives and cars for the conduct of its business or for the purposes of a freight yard; and also to locate, build, maintain, and operate, beyond the city limits, a branch track or "Y" for the passage of trains directly to and fro between the Metropolitan Branch and the Washington Branch without entering the city: *Provided*, That said roundhouses and shops shall be located within said "Y" as far eastwardly as in the judgment of the Commissioners of the District of Columbia it is practicable.

SEC. 3. That to accomplish the purposes of this Act the following-named streets in the subdivision of Eckington east of the right of way of the Metropolitan Branch of the Baltimore and Ohio Railroad Company shall be completely vacated and abandoned by the public and closed to public use, namely: Q, R, Third between New York avenue and Florida avenue, Fourth, Fifth, and Randolph streets; S and Seaton streets west of Sixth street; and Sixth street south of U street and Seventh street between New York avenue and Brentwood

road shall not be opened. The Brentwood road shall also be closed between S street and Florida avenue. New York avenue and Florida avenue shall be carried under said railroad, as provided in the first section of this Act. T and V streets shall be carried under by a subway, or over the Metropolitan Branch Railroad by a bridge or viaduct. Between the north line of M street and the south line of G street all the tracks hereinbefore authorized shall be elevated and carried on a masonry viaduct, which said viaduct shall be so constructed with arches or bridges as to permit each and every intersecting street or avenue in the city to be passed and continued under the same through arched openings or spaces of sufficient clearance to permit the free and unobstructed use of said streets and avenues, in the form and manner and of the dimensions shown and indicated on the plan and profiles agreed upon between the said Baltimore and Ohio Railroad Company and the Commissioners of the District of Columbia, and now on file in the office of the Engineer Commissioner: *Provided*, That M street may be crossed by a metal bridge instead of a masonry arch, if desired, in order to avoid any change in the grade of said street.

The following-named streets within the city limits shall be completely vacated, abandoned, and closed, namely: N street, between Second street east and Third street east, and Delaware avenue shall be closed and abandoned between the south line of Florida avenue and the north line of M street; E street between First street and North Capitol street; D street between First street and North Capitol street, and Delaware avenue between F street and C street, it being the intention of this Act that all streets, avenues, ways, and alleys within the area to be occupied and used for terminals and terminal tracks, as shown on said plan filed in the office of the Engineer Commissioner, shall be completely vacated,

abandoned, and closed, and the use thereof and of any public reservation or street spaces of the United States within said area be granted to the said railroad company or terminal company constructing such terminals for the purposes of the same, except that Massachusetts avenue and F street shall be carried under said terminals by means of arches, in accordance with plans approved by the Commissioners of the District of Columbia.

The Commissioners of the District of Columbia are hereby authorized and directed to cause all streets, avenues, ways, and alleys to be closed, as provided in this act and in accordance with the intent thereof; and also to make such changes in the existing lines and grades of any street, avenue, or way as may be reasonably required, deemed necessary, or advisable in the construction of the works hereby authorized.

That such portions of the structures carrying T and V streets over and under the tracks of the Baltimore and Ohio Railroad Company as lie within the limits of the right of way of said company shall be built and paid for by said company; and that so much of the change of grade at M street and Florida avenue as may be necessary to carry said highways under the line of the railroad within the limits of the right of way of said company shall be paid for by the railroad company. The approaches, however, to said T street, V street, Florida avenue, and M street, and all the work not within the right of way at said points shall be made and constructed by and under the supervision of the Commissioners of the District of Columbia, and paid for from funds available for the purpose.

SEC. 4. That the Baltimore and Ohio Railroad Company shall, before taking possession of the ground now owned by the United States in square six hundred and eighty-three, secure and convey to the United States a tract of ground containing not less than twenty-one

thousand square feet, which location shall be subject to the approval of the Commissioners of the District of Columbia and the Sergeant-at-Arms of the United States Senate, and locate thereon a fire-engine house at a cost of not less than thirty thousand dollars and stables at a cost of not less than fifteen thousand dollars, or, if said company prefers, it may have the said buildings erected by the Commissioners of the District of Columbia by depositing the amounts stated above with the said Commissioners and Sergeant-at-Arms, respectively, and when such buildings have been accepted by the District of Columbia and the Sergeant-at-Arms of the Senate, respectively, or the amounts necessary for their construction deposited as aforesaid, it shall have authority to remove said structures on the ground aforesaid. And the Baltimore and Ohio Railroad Company shall have the right to condemn such land in the city as is hereinbefore required, and for said purposes the provisions of section eleven of this Act are hereby made applicable to the provisions of this section.

SEC. 5. That in addition to the main or terminal station or depot, to be located as hereinbefore provided, the Baltimore and Ohio Railroad Company, or the terminal company incorporated as provided in this Act, may from time to time hereafter construct, establish, and maintain such additional stations or depots, for passengers or freight, as the company may deem necessary or useful in the conduct of its business, or for the accommodation of the freight and passenger traffic passing over the lines of railroad authorized by this Act, at such point or points within said District as the Commissioners of the District of Columbia shall approve: *Provided*, That no such station or depot within the city limits shall be located east of Second street east, and west of North Capitol street, and it shall be lawful for

either of said companies to acquire by gift, purchase, or, condemnation, any land adjacent to any street or avenue along or upon which the lines of railroad and works hereby authorized shall be located, and hold and improve the same in such manner as it may deem necessary or beneficial to accommodate or promote the traffic on said railroad, and to extend and construct tracks of railroad into and upon any lands so acquired and connect the same with the tracks on such adjacent street or avenue: *Provided, however*, That no grade crossing of any street or avenue within the city of Washington shall be thereby created, but such connecting tracks shall be elevated and carried over the portion of such street or avenue crossed in such manner as not to obstruct the free use thereof, and the plans of such connecting tracks and elevated structure shall in every case be first filed with and approved by the Commissioners of the District of Columbia. And it shall be lawful for said companies, or either of them, subject to the same conditions and restrictions, to extend and construct, from time to time, branch tracks or sidings from the lines of railroad authorized by this Act into any lot or lots adjacent to any street or avenue along which said lines of railroad are located, upon the application of the owner or owners of such lot or lots, to enable such owners to use their property for the purposes of coal, wood, or lumber yards, manufactories, warehouses, and other business enterprises.

SEC. 6. That if it should at any time be deemed necessary or advisable in the construction of the works hereby authorized to lay temporary tracks on any street or avenue to accommodate the business of the Baltimore and Ohio Railroad Company pending the completion of such works, the said company may lay such temporary tracks, subject to the approval and under the direction of the Commissioners of the District of Columbia, and

shall remove the same and restore every such street or avenue to its former condition, to the satisfaction of such Commissioners, within sixty days after the time fixed for the completion of the works hereby authorized.

SEC. 7. That it is the intention of this Act that the location and construction of the new terminals, terminal tracks, viaduct, and railroad lines hereby authorized within the city of Washington shall be substantially in accordance with the plans agreed upon by and between the Commissioners of the District of Columbia and the Baltimore and Ohio Railroad Company, which plans, with the accompanying drawings, maps, and tracings, signed by the Commissioners and by the chief engineer of such railroad company, are filed in the office of the Engineer Commissioner of said District; but that the company constructing said works shall be authorized to make such minor changes or modifications of or departures from said plans, drawings, maps, and tracings as it may reasonably require or deem necessary, advisable, or advantageous and as the Commissioners shall approve and agree to; and in case of any change or modification of or departure from the present plans the Baltimore and Ohio Railroad Company shall submit the new plans to the said Commissioners for their approval, and shall file duly authenticated copies of said plans, after approval, with the Commissioners.

All work of construction authorized by this Act which shall affect in any way the existing streets or avenues of the city or District not hereby abandoned and closed shall be done to the satisfaction and subject to the approval of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance thereof. The company shall also deposit with the collector of taxes of the District of Columbia such sums of money as the

Commissioners of said District may reasonably require to cover the cost of District inspection.

SEC. 8. That of the works hereby authorized the viaduct and main lines of railroad thereon and extending therefrom to their points of connection with the Washington Branch Railroad and Metropolitan Branch Railroad, respectively, shall be completed, and said new terminals shall be ready for occupancy, within five years from the date of the passage of this Act.

From and after the expiration of five years from the date of the passage of this Act all rights of the Baltimore and Ohio Railroad Company to maintain and operate the present tracks of its Washington Branch Railroad within the limits of the city of Washington, and the present tracks of its Metropolitan Branch Railroad south of the northern line of New York avenue, also extending from the north line of New York avenue to the north line of Q street, and west of the east line of Third street to said north line of New York avenue, shall cease and determine; and the said railroad company shall thereupon, within such reasonable time as the Commissioners of the District of Columbia shall prescribe, remove all such tracks and structures connected therewith from the streets, avenues, public reservations, or other property of the United States on all the lines to be abandoned as aforesaid. Said Baltimore and Ohio Railroad Company shall also immediately execute, acknowledge, and deliver to the Commissioners of the District of Columbia a deed, in due form of law, granting, conveying, assigning, and transferring to the United States of America all the estates, right, title, and interest that it, the said Baltimore and Ohio Railroad Company, has in, to, or out of the lands included within the limits of the roadway or right of way of the Washington Branch Railroad of said company from the west line of Second street to Winthrop Heights station and of the

Metropolitan Branch for the continuation of Third street from Q street south to New York avenue, of an even width as north of Q street, subject, however, as to so much of said lands as lie north of Florida avenue and outside of the limits of the city of Washington, to the continued maintenance and use of the present tracks of said railroad company thereon, for the purpose of reaching its yard and roundhouse at Trinidad, until its new yard in or near Eckington and its roundhouse, authorized by this Act, shall be ready for use, but not exceeding six years from the date of the passage of this Act; said company, however, to have the right to remove its tracks and structures from the lands so granted within sixty days after the expiration of its right to maintain and use its tracks thereon.

In consideration of the surrender by the Baltimore and Ohio Railroad Company, under the requirements of this Act, of its rights under the several Acts of Congress heretofore passed, and under its several contracts with the municipal authorities of the city of Washington authorized by said Acts of Congress, and in consideration of the large expenditures required for the construction of the new terminals, viaduct, and connecting railroads, as required by this Act, to avoid all grade crossings of streets and avenues within the city of Washington, and, further, in consideration of the grant and conveyance to the United States of the lands included within the limits of the roadway and right of way of the Washington Branch Railroad, which can be used for a street or avenue for the public benefit, the sum of one million five hundred thousand dollars, to be paid to said railroad company toward the cost of the construction of said elevated terminals, viaduct, and structures within the city of Washington, shall be, and is hereby, appropriated, one half to be paid out of any money in the Treasury of the United States not otherwise

appropriated, the other half to be paid out of the revenues of the District of Columbia. The sum so appropriated shall be paid upon presentation of a certificate by the Commissioners of the District of Columbia that the said viaduct has been completed as required by this Act.

In order to provide for the one half of said amount chargeable to the District of Columbia, the Commissioners thereof shall, on the first day of July following the passage of this Act, and annually thereafter, pay over to the Treasurer of the United States, out of the revenues of the District of Columbia, the sum of one hundred and fifty thousand dollars, to be invested by the said Treasurer in interest-bearing bonds of the United States or the District of Columbia, until the full sum of seven hundred and fifty thousand dollars, as provided herein, shall have been paid.

SEC. 9. That the property occupied by the Baltimore and Ohio Railroad Company, or by the proposed terminal company, under authority of this Act, together with the improvements which may be put thereon, shall be subject to tax by the District of Columbia the same as other property in the District of Columbia: *Provided*, that no assessment, valuation, or tax shall be made or levied on the railroad or terminals located, constructed, or maintained under the authority of this Act in excess of that which would or could be lawfully made, laid, or levied if said railroad and terminals were so located, constructed, and maintained without the use of bridges, viaducts, retaining walls and other structures necessary or properly employed to elevate the same as required by this Act, it being the true intent and meaning hereof that the railroad and terminals hereby authorized shall be assessed and valued for purposes of taxation and taxed on the same basis as if the same were not constructed and maintained by means of such bridges, viaducts, retaining walls, and other structures.

SEC. 10. That if for the purpose of constructing and owning the terminals, viaduct, railroads, depots, stations, and other works authorized by this Act, or any part thereof, the Baltimore and Ohio Railroad Company shall deem it expedient or advisable that a terminal company in its interest be created and organized in the District of Columbia, the said Baltimore and Ohio Railroad Company, or some person thereto authorized on its behalf by resolution of its president and directors, together with other persons not less than seven in number, of whom a majority shall be residents of the District of Columbia, shall cause a certificate of incorporation to be executed and recorded in accordance with the provisions of the general incorporation Act of Congress for the District of Columbia relating to railroad companies, being sections six hundred and eighteen to six hundred and seventy-six, both inclusive, of the Revised Statutes relating to the District of Columbia, with such capital stock, not to exceed five million dollars fully paid up, and under such corporate name as may be set forth in such certificate. The corporation so formed shall be vested with all the authority, rights, and privileges granted by said general Act, but the Baltimore and Ohio Railroad Company, or such persons as it may designate by resolution of its president and directors, shall be entitled to subscribe for and hold all the stock of said corporation, without advertisement or allotment, as provided in said sections six hundred and twenty-one and six hundred and twenty-two of said Revised Statutes. Said corporation shall also be vested with and enjoy all the authorities, rights, and privileges herein granted, so far as the same are applicable to or exercisable in its undertaking, as set forth in its said certificate of incorporation, and it shall be bound by all the limitations and provisions of this Act. Said corporation shall have the further powers to contract with the Baltimore and Ohio Railroad Company for the use

or operation of its railroad and works by the last-named company, or for the lease of the same, on such terms as may be agreed upon between the two companies, and shall also have the right and power, exercisable at any time, to sell and convey all its railroad, works, and property to the said Baltimore and Ohio Railroad Company in consideration of the latter company assuming all its debts and liabilities and agreeing to repay to every stockholder the amount of money actually paid in on the stock held by him.

On the execution, delivery, and recording of the deed of conveyance, pursuant to and in consummation of such sale, the said terminal company shall ipso facto be dissolved and its corporate existence shall cease.

In the event, however, that the said terminal company shall not be organized under the provisions of this Act then the privileges, powers, and duties herein conferred and imposed shall devolve exclusively upon the Baltimore and Ohio Railroad Company.

SEC. 11. That the Baltimore and Ohio Railroad Company and the terminal company incorporated as herein provided shall be authorized and empowered, from time to time, to take, acquire, and hold, in fee simple, all lands and property required for the terminals, stations, yards, railroad facilities, and other works authorized by this Act, either by purchase or by condemnation, as provided in sections six hundred and forty-eight to six hundred and sixty-three, both inclusive, of the Revised Statutes, relating to the District of Columbia: *Provided*, That in every case in which an assessment of damages or an award shall have been returned by the appraisers, the company upon paying into court the amount so assessed or awarded, may enter upon and take possession of the lands and property covered thereby, irrespective of whether exceptions to said assessment or award shall be filed or not, and the subsequent proceedings shall not

interfere with or affect such possession, but shall only affect the amount of the compensation to be paid.

SEC. 12. That the Baltimore and Ohio Railroad Company and the Terminal Company, incorporated as provided in this Act, be, and they are hereby, authorized and empowered to locate, construct, maintain, and operate outside of the limits of the city of Washington a line of railroad with one or more tracks extending from a connection with the Washington Branch Railroad and with the railroad authorized by the foregoing sections of this act north of Winthrop Heights station by such route as the company may select as most practicable, and be approved by the Commissioners of the District of Columbia, to a connection with the Baltimore and Potomac Railroad and with the said Baltimore and Ohio Railroad Company's Shepherds branch at or near Bennings station; and in the location, construction, maintenance, and operation of the line of railroad authorized by this section the said companies may exercise all the authorities, rights, privileges, and franchises by this act conferred upon and vested in them in respect of the lines of railroad authorized by the foregoing sections of this act, outside of the limits of the city of Washington: *Provided*, That whenever in the construction of said line of railroad it shall be found necessary to cross any existing public highway of the District of Columbia the company shall submit to and file with the Commissioners of the District of Columbia proper plans showing the intended crossing, shall obtain the approval of the same by the said Commissioners, and shall construct such crossing only in conformity with such approved plan. Every such highway crossing shall be either over or under grade where practicable without increasing the grades on said railroad or causing unreasonable expense in construction; and for the purpose of avoiding grade crossings the Commissioners of the District of Columbia shall be fully authorized and

empowered to change the grade of any such public highway so as to pass the same over or under said railroad, and to deflect or divert any such highway so as to pass over or under said railroad at a different point of crossing, and to close so much of the said highway as is abandoned; and the company shall acquire, by purchase or condemnation, at its own expense, all lands required to relocate such highways, and shall pay the cost of all new construction or work required to restore any such highway raised, depressed, deflected, or relocated as above provided, all of which construction and work shall be done to the satisfaction and subject to the approval of the said Commissioners.

SEC. 13. That all existing laws or parts of laws inconsistent with the provisions of this Act are hereby repealed to the extent to which they are so inconsistent, but to no further or other extent.

SEC. 14. That Congress reserves the right to alter, amend, or repeal this Act.

Approved, February 12, 1901.

CHAP. 353. AN ACT TO PROVIDE FOR ELIMINATING CERTAIN GRADE CROSSINGS ON THE LINE OF THE BALTIMORE AND POTOMAC RAILROAD COMPANY, IN THE CITY OF WASHINGTON, DISTRICT OF COLUMBIA, AND REQUIRING SAID COMPANY TO DEPRESS AND ELEVATE ITS TRACKS, AND TO ENABLE IT TO RELOCATE PARTS OF ITS RAILROAD THEREIN, AND FOR OTHER PURPOSES. [31 STAT. U. S., PP. 767–774.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Baltimore and Potomac Railroad Company be, and it is hereby, empowered, authorized, and required to revise, change, and improve the alignment

and grade of its railroad, and to relocate parts thereof within the city of Washington, in the District of Columbia, as hereinafter provided, to wit:

Beginning at a point in its present tunnel under Virginia avenue near the intersection of Eleventh street southeast, and extending thence by a continuation of said tunnel, with a width sufficient for not less than two nor more than four tracks, along and under Virginia avenue to the west side of Second street southeast; thence in the open, with a width sufficient for four main tracks, along what would be Virginia avenue if extended through reservation seventeen, now called Garfield Park, to another section of Virginia avenue as now opened at South Capitol street; thence along said last-mentioned section of Virginia avenue to a connection with its present four main tracks and right of way near Delaware avenue; thence continuing said four tracks along and on said Virginia avenue and Maryland avenue to the Potomac River; and also from points on said last-described line, that is to say, from east of Sixth street southwest; thence by a curved line with three tracks crossing over Sixth street southwest, Maryland avenue, and B street southwest, to and upon that portion of the Mall hereinafter described; and from a point west of Seventh street southwest by a curved line, with three tracks over Seventh street southwest, Maryland avenue, and B street southwest, to and upon said portion of said Mall, with such grade, and at such elevations, with reference to the streets of said city, and on such locations as are shown on plans and profiles prepared by said railroad company, and approved by the Commissioners of the District of Columbia, and as hereinafter specified; it being the purpose of this Act that the said railroad shall be located under Sixth street southeast, Fifth street southeast, Fourth street southeast, Third street southeast, and Second street southeast, in a tunnel as afore-

said; that New Jersey avenue shall be carried over said railroad on an iron or steel bridge; and that said railroad shall be carried over South Capitol street, Delaware avenue, First street southwest, Second street southwest, Third street southwest, Four-and-a-half street southwest, Sixth street southwest, Seventh street southwest, Maryland avenue, and B street southwest, and that Ninth street southwest, Tenth street southwest, Eleventh street southwest, and Twelfth street southwest shall be carried over said railroad on iron or steel bridges. The railroad shall also be carried over Water street southwest.

REMOVAL OF TRACKS FROM SIXTH, K, AND CANAL STREETS.

SEC. 2. That the said Baltimore and Potomac Railroad Company be, and it is hereby, required to remove its present eastern connection between its passenger station and its line on Virginia avenue via Sixth street, including all tracks on Sixth street, and its western connection via Maryland avenue, and to change and relocate its tracks connecting with the new terminus contemplated by this Act, in the manner authorized and provided by the preceding section hereof, and as shown on the plans and profiles in said section referred to, and also shall remove its tracks from K street and Canal street, east of New Jersey avenue southeast; and said tracks which are to be abandoned shall be removed within sixty days after the new track is ready for use, and the roadway of said Sixth street between B street south and B street north shall be provided with a modern pavement at the expense of said railroad company, to the satisfaction of the Commissioners of the District of Columbia.

STATION BUILDING.

SEC. 3. That in order to accommodate the increasing passenger, mail, express, and other traffic in the city of Washington the said Baltimore and Potomac Railroad

Company shall have and be possessed of the right, which is hereby granted and conferred, to occupy and use, on the conditions hereinafter mentioned, that portion of the Mall lying between B street southwest and B street northwest as the southerly line of said B street northwest is hereinafter defined, and between the west line of Sixth street and a line drawn parallel therewith and three hundred and forty feet west thereof, and to erect and maintain thereon a station building and appurtenances, train sheds, and tracks and sidings in connection therewith suitable and adequate for the convenient accommodation of said traffic; and the said Baltimore and Potomac Railroad Company shall, in connection with its occupation and use of the portion of the Mall hereby granted, locate, construct, and maintain beneath its tracks and structures on the line of West Capitol street, as shown on the city maps, a substantial arch or arches not less than two hundred feet in width, as a public passageway for vehicular and pedestrian traffic (as shall be approved by the Commissioners of the District of Columbia), which shall be so constructed as to afford roadways and sidewalks, and the said company shall also pave the said passageways at the time of their construction to the satisfaction of the Commissioners of the District of Columbia, but thereafter the maintenance of the pavemen nd roadways shall devolve upon the said District of Columbia. The station building to be erected on the Mall shall cost not less than one million five hundred thousand dollars, inclusive of the car sheds, which shall be of ornamental or monumental character, and shall be designed, so far as practicable, so as not to impair the appearance of the Mall; the plans thereof to be approved by the Secretary of War: *Provided*, That upon the lands on the Mall hereby granted to the use of the Baltimore and Potomac Railroad Company no freight depot, warehouse, or other structure, except such as is necessary to its use as the

site of a passenger station, shall be erected; and that no tracks, except such as are necessary to the service of such passenger station shall be laid or operated on said land.

TEMPORARY TRACKS.

SEC. 4. That if it should at any time be deemed necessary or advisable, in the construction of the works herein authorized, to lay temporary tracks on any street or avenue to accommodate the business of the Baltimore and Potomac Railroad Company pending the completion of such works, the said company may lay such temporary tracks, subject to the approval and under the direction of the Commissioners of the District of Columbia, and shall remove the same and restore every such street or avenue to its former condition, to the satisfaction of said Commissioners, within sixty days after the time fixed for the completion of the works herein authorized.

REMOVAL OF FISH COMMISSION BUILDING.

SEC. 5. That the United States Fish Commission building and appurtenances, now located on that part of the Mall hereby granted to said Baltimore and Potomac Railroad Company, shall be removed therefrom and rebuilt on the said Mall west of the portion thereof so granted to said railroad company, under the directions of, and according to plans approved by, the Chief of Engineers of the United States Army; and the cost of such removal and rebuilding shall be defrayed by the said Baltimore and Potomac Railroad Company to an amount not exceeding forty thousand dollars: *Provided*, That the expense of such removal and rebuilding in excess of forty thousand dollars shall be paid by the United States.

RETAINING WALLS.

SEC. 6. That in elevating or depressing its tracks, as hereinbefore authorized, the said railroad company is

hereby required to support the sides of all embankments and excavations made in the streets wherein the same are located with suitable retaining walls of stone. These walls, in cases of excavation, shall be carried to a height of four feet above the revised grades of said streets, or shall be provided with suitable iron railings. The space to be occupied and used by the said railroad company where its tracks are depressed on Maryland avenue shall not exceed fifty-eight feet between the inside faces of the parallel retaining walls, measured at the level of the said tracks, as shown on said plans and profiles.

STREETS TO BE VACATED.

SEC. 7. That to enable said Baltimore and Potomac Railroad Company to effect the revision, change, and improvement in the alignment and grade of its railroad, and the relocation of parts thereof as authorized and contemplated by this Act, the following-named streets and crossings in said city of Washington shall be, upon the completion of the work herein authorized, completely vacated and abandoned for public use, namely:

Canal street, as located and shown on the city maps, between South Capitol street and New Jersey avenue.

G street southeast and H street southeast, between South Capitol street and New Jersey avenue.

I street southeast, between First and South Capitol streets.

Virginia avenue, on the south side of the said railroad, between Second street and Four-and-a-half street southwest, and on the north side of the said railroad between Four-and-a-half street and Seventh street southwest.

Maryland avenue, on the south side of said railroad, between Ninth and Tenth streets southwest.

Maryland avenue, between Twelfth and Fourteenth streets southwest; and in consideration of, and in connection with, the vacation of said portion of Maryland

avenue between Twelfth and Fourteenth streets southwest, the said railroad company shall acquire and dedicate to the District of Columbia the necessary property to increase the present width of D street southwest, between Twelfth and Fourteenth streets southwest, thirty feet on the south side thereof.

Thirteenth and Thirteen-and-a-half streets, between D and Water streets southwest, and

E street southwest, between Twelfth street southwest and Water street.

The following-named streets are hereby vacated and abandoned, namely:

F street southwest and E street southwest, where they cross the said railroad;

D street southwest, between Four-and-a-half and Sixth streets southwest;

C street southwest, between Sixth and Seventh streets southwest: *Provided, however,* That nothing herein contained shall be construed to prohibit the public authorities from entering upon vacated and abandoned streets and avenues for the purpose of locating, constructing, maintaining, or repairing therein sewers, water mains, gas mains, conduits, or other underground construction necessary for the public comfort, convenience, or health: *And provided further,* That no portion of any street shall be closed under authority of this Act until said railroad company shall have secured control of the property abutting upon said portion to be closed, it being the intent hereof that no property owner shall be deprived of egress from or ingress to his property.

CHANGES IN GRADE; WIDENING B STREET.

The Commissioners of the District of Columbia are hereby authorized and directed to make all such changes in the lines and grades of any street or streets in said city as may be reasonably required or deemed necessary

or advisable in connection with the revision, change, improvement, and partial relocation of said railroad by this Act contemplated, and particularly are authorized and directed to widen B street northwest, on its southerly side, between Sixth and Seventh streets, so as to conform to the southerly line of said street as it now exists west of Seventh street, and to widen Seventh street on its easterly side between B street northwest and the northerly line of West Capitol street, as shown on the city maps, as follows: For a distance of one hundred and thirty feet south from the southerly line of said B street northwest, when widened as herein authorized, to a width of two hundred and twenty feet, and for the residue of the distance to the northerly line of West Capitol street to a width not exceeding one hundred and thirty feet.

GARFIELD PARK.

SEC. 8. That in consideration of and in connection with the changes and improvements to be made in the said railroad by the Baltimore and Potomac Railroad Company, in conformity with the requirements of this Act, the said railroad company shall have and be possessed of the right and privilege, which are hereby expressly granted and conferred, to occupy and use, for tracks and other corporate purposes, all that portion of reservation seventeen, now known as Garfield Park, which lies to the southward of its main tracks when located as authorized by this Act, as well as that portion thereof which shall be occupied by said main tracks as located on said plans and profiles; and also the like right and privilege to occupy and use, for similar purposes, the parts or portions of the several streets and crossings which are by this Act vacated and abandoned.

DIVISION OF COSTS.

SEC. 9. That the entire cost and expenses of the revision, changes, relocations, and improvements of and in

said railroad, as authorized and required by the preceding sections of this Act, and of all structures connected therewith or incidental thereto, shall be borne, paid, and defrayed in manner following, to wit: The said Baltimore and Potomac Railroad Company shall bear, pay, and defray all cost and expense of the relocations, elevation, and depression of its tracks within the limits of its right of way as are authorized and required by this Act, including the construction of so much of the bridges conveying streets over its tracks, right of way, and other property as shall be within the limits thereof, and the reconstruction within such limits of the streets which shall be carried beneath the same, the cost and expense of removing its tracks from Sixth street north of Virginia avenue, and from K street and Canal street, and the restoration of such parts of said streets for the uses of the public, and the cost and expense of constructing and maintaining the arch or arches for passageways underneath its said tracks located on the Mall, as well as the original cost of paving the roadways and sidewalks to be located within the said passageways. All other costs, expenses, and damages resulting from, incidental to, or connected with the revisions, changes, and improvements in alignment and grades of said railroad, or the relocations thereof by this Act required and authorized, and from changes in the grades of the streets or the railroad, and the lawful operation of the said railroad upon the location and structures contemplated and required by this Act, and whether to property owners affected thereby or otherwise, as well as the cost and expense of all street approaches to said company's tracks and right of way, whether overhead by means of bridges or under grade, shall be borne, paid, and defrayed in manner following, to wit: Fifty per centum thereof by the United States and the remaining fifty per centum thereof by the District of Columbia, which last-mentioned

fifty per centum shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia.

All work within the limits of the said railroad company's right of way, including the bridges within said limits, shall be done by said railroad company to the satisfaction and approval of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance of the said work. And all work which is without the limits of the right of way of said railroad company shall be done by the District of Columbia.

PROPERTY TO BE ACQUIRED BY PURCHASE OR CONDEMNATION.

SEC. 10. That to enable the Baltimore and Potomac Railroad Company to effectuate the purposes contemplated and authorized by this Act, the said company be, and they are hereby, authorized and empowered to acquire, either by purchase or condemnation, as hereinafter provided, and, when so acquired, to use the same for tracks and other corporate purposes, and make all such improvements thereon and thereto as may be deemed necessary, the following properties, to wit: All of squares four hundred and sixty-two, four hundred and sixty-three, four hundred and sixty-three south, and four hundred and ninety-three; and also as much land as may be required for tracks and other corporate purposes which lies to the south of the present main tracks of the company between South Capitol and First streets southeast and north of the northerly line of M street: *Provided, however,* That if land shall be acquired south of the present railroad yards and between

South Capitol and First streets southeast as in this section authorized the said railroad company shall, when so required by the Commissioners of the District of Columbia, make adequate and suitable provision for carrying such streets as may intersect the same across the tracks which shall be located thereon by overhead bridges in a manner satisfactory to the said Commissioners: *Provided further*, That the cost and expense of raising grades of streets and all approaches to such bridges shall be borne and defrayed by the District of Columbia and the United States, as hereinbefore provided.

In case the said Baltimore and Potomac Railroad Company can not, for any reason, agree with the owner or owners for the purchase, use, or occupation of any of the land it is authorized to acquire by purchase or condemnation, then the same may be acquired by the said company in the same manner and by the same procedure as are provided by sections six hundred and forty-eight to six hundred and sixty-three, both inclusive, of the Revised Statutes, relating to the District of Columbia: *Provided*, That in every case in which an assessment of the damages or an award shall have been returned by the appraisers the company, upon paying into court the amount so assessed or awarded, may enter upon or take possession of the land and property covered thereby irrespective of whether exceptions to said assessment or award shall be filed or not, and the subsequent proceedings shall not interfere with or affect such possession, but shall only affect the amount of the compensation to be paid. And it shall be lawful for said Baltimore and Potomac Railroad Company to extend and construct, from time to time, branch tracks or sidings from the lines of railroad authorized by this Act into any lot or lots adjacent to any street or avenue along which said lines of railroad are located, upon the application of the owner or owners of such lot or lots, to enable such

owners to use their property for the purposes of coal, wood, or lumber yards, manufactories, warehouses, and other business enterprises: *Provided, however,* That no grade crossing of any street or avenue within the city of Washington shall be thereby created, but such connecting tracks shall be carried across such street or avenue in such manner as not to obstruct the free use thereof, and the plans of such connecting tracks shall in every case be first filed with and approved by the Commissioners of the District of Columbia: *Provided further,* That as to square southeast of square two hundred and sixty-seven and square two hundred and seventy the Southern Railway Company (a railroad corporation of the State of Virginia, whose trains now move and are expected to continue to move to and from Washington over the tracks of the said Baltimore and Potomac Railroad Company and Washington Southern Railroad Company under agreements existing or hereafter to be made with the last-named companies granting the necessary right therefor) and its successors shall have the same rights of acquisition by purchase or condemnation, to be exercised under the same conditions, as are in this Act provided for the acquisition of additional land by the Baltimore and Potomac Railroad Company; and such squares when so acquired may be used by said Southern Railway Company and its successors to accommodate the handling and delivery of local freight traffic and for its other corporate purposes in the District of Columbia.

LONG BRIDGE.

SEC. 11. That inasmuch as the present Long Bridge over the Potomac River is inadequate for the accommodation of the largely increased railroad and vehicular traffic, is in a measure obstructive of navigation, and needs to be reconstructed, the Baltimore and Potomac Railroad

Company is hereby directed and required to remove the present Long Bridge across the Potomac River, and, in accordance with plans to be approved by the Secretary of War, to build on practically the same line a new bridge in lieu thereof, said new bridge to be for railroad purposes only and to be adapted for two or more railway tracks, the Long Bridge to be removed and the new bridge constructed within four years from the date of the passage of this Act. The said Baltimore and Potomac Railroad Company shall remove the Long Bridge and shall build, maintain, and keep in repair said new bridge at its own cost and expense, and shall maintain an efficient draw in said new bridge, operating the same so as not to unnecessarily impede the free navigation of the Potomac River at any hour of the day or night, and shall give other railroad companies the right to pass over said bridge upon such reasonable terms as may be agreed upon between the companies or prescribed by Congress.

PASSENGER BRIDGE.

SEC. 12. That the Secretary of War be, and he is hereby, authorized to enter into a contract with the Baltimore and Potomac Railroad Company or any other party to construct within two years after the passage of this Act, at a point not less than five hundred feet above the site of the present Long Bridge, a new and substantial bridge for highway travel, of iron or steel, resting upon masonry piers and provided with suitable approaches, and with a sufficient draw, all in accordance with plans and specifications to be approved by the Secretary of War; and there is hereby appropriated (one-half out of the revenues of the District of Columbia and one-half out of any money in the Treasury not otherwise appropriated) the sum of five hundred and sixty-eight thousand dollars, or so much thereof as may be necessary, to

be paid from time to time, as the construction of the said bridge progresses, by the Secretary of War, under such regulations as he shall prescribe.

The said bridge shall be for highway traffic, and all street railroads chartered or that may hereafter be chartered by Congress shall have the right to cross said bridge on such terms as may be prescribed by Congress: *Provided,* That the Washington, Alexandria and Mount Vernon Railway Company now using the Long Bridge shall be permitted, with the approval of the Commissioners of the District of Columbia, to change its location so as to cross the highway bridge herein provided for; all plans for such change to be approved by the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army: *And provided further,* That a standard underground electric system of street car propulsion shall be installed by said company on the park highway leading to said bridge, and no dynamo furnishing power to this portion of the road shall be in any manner connected with the ground and that the cost of asphalt paving between the tracks and two feet outside thereof shall be paid by said company. Each street railway company using said bridge shall pay in addition to other taxes as by its charter provided, one-half of one cent for each and every passenger carried across said bridge.

PLANS TO BE SUBMITTED TO DISTRICT COMMISSIONERS.

SEC. 13. That before any portion of the work herein described shall be authorized plans and profiles of the entire work, except such as relate to the new bridges authorized by sections eleven and twelve, in accordance with the provisions herein contained, shall be prepared by the said Baltimore and Potomac Railroad Company and shall be submitted for approval to the Commissioners of the District of Columbia. Duly authenticated

copies of said plans and profiles shall, after approval, be filed with the Commissioners aforesaid, and all work shall be done in accordance with them and shall be completed within five years from the date of the passage of this Act. The company shall also deposit with the collector of taxes of the District of Columbia such sums of money as the Commissioners of said District may reasonably require to cover the cost of District inspection.

TAXATION.

SEC. 14. That the property occupied by the Baltimore and Potomac Railroad Company under authority of this Act, together with the improvements which may be put thereon, shall be subject to tax by the District of Columbia the same as other property in the District of Columbia: *Provided*, That no assessment, valuation, or tax shall be made, laid, or levied on the Baltimore and Potomac Railroad Company on account of any bridges, tunnels, elevated tracks, or subway which shall be located, constructed or maintained under the authority of this Act, and forming part of said railroad, in excess of that which would or could be lawfully made, laid, or levied if said railroad was wholly located and constructed on the surface of the ground; it being the true intent and meaning hereof that any such bridges, tunnels, elevated tracks, or subway forming a part of said railroad shall be assessed and valued for purposes of taxation and taxed on the same basis as any other equal portion of railroad situated within the said District of Columbia not constructed on, in, through, or upon any such bridges, tunnels, elevated tracks, or subway.

RIGHTS OF SUCCESSION.

SEC. 15. That all the provisions of this Act, including all rights powers, and privileges granted to, or duties imposed upon, said Baltimore and Potomac Railroad

Company, shall accrue to and devolve upon its successors and assigns; and in case the said Baltimore and Potomac Railroad Company, its capital stock, properties, corporate rights, powers, privileges, immunities, and franchises, shall be merged into or consolidated with the Philadelphia, Wilmington and Baltimore Railroad Company, or any other railroad corporation, to which the assent of Congress is hereby given, then and in that event the company which shall, by such merger or consolidation, so acquire the same shall be invested with and possessed of all the rights, powers, property, and privileges of said Baltimore and Potomac Railroad Company within the District of Columbia, as well those granted by this act as those heretofore existing, and shall have and exercise all the necessary rights, powers, and franchises respecting the same as fully as they would have been possessed and exercisable by said Baltimore and Potomac Railroad Company.

REPEAL OF CONFLICTING ACTS.

SEC. 16. That all laws or parts of laws inconsistent herewith be and they are hereby, repealed.

RESERVED RIGHTS OF CONGRESS.

SEC. 17. That Congress reserves the right to alter, amend, or repeal, this act.

Approved, February 12, 1901.

CHAP. 856. AN ACT TO PROVIDE FOR A UNION RAILROAD STATION IN THE DISTRICT OF COLUMBIA, AND FOR OTHER PURPOSES. [32 STAT. U. S., PT. I, PP. 909–918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Philadelphia, Baltimore and Washington Railroad Company, (a corporation duly created by consolidation and merger of the Philadelphia, Wil-

mington and Baltimore Railroad Company and the Baltimore and Potomac Railroad Company, their respective capital stocks, railroads, properties and franchises) or the terminal company provided for in section ten of the Act of Congress approved February twelfth, nineteen hundred and one, entitled "An Act to provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore and Ohio Railroad Company in the city of Washington, and for other purposes," be, and each of them is hereby, authorized and required to locate, construct, maintain, and operate a double-track railroad, commencing at a point on the railroad of said Philadelphia, Baltimore and Washington Railroad Company at or near the crossing of Second street southwest, at the elevation of said railroad provided for in the said Act of Congress relating to the Baltimore and Potomac Railroad Company approved February twelfth, nineteen hundred and one; thence curving toward the north, crossing over Virginia avenue with a clearance of fifteen feet above the present curb thereof, crossing over First street southwest and Delaware avenue southwest, at a point about forty feet north of the north house line of E street, with a clearance of not less than sixteen feet; thence curving to the northward, crossing over Canal street and South Capitol street with a clearance of not less than fourteen feet above the curbs thereof; thence passing under the intersection of D street with New Jersey avenue, C street southeast, and B street southeast at the intersection with First street; thence continuing under the west side of First street to near E street northeast; thence curving to the eastward, crossing under the proposed circle at Massachusetts avenue to a connection with the tracks in the proposed terminal station to be built on the north side of Massachusetts avenue hereinafter provided for; thence running

from the said north line of Massachusetts avenue on the terminal station structure hereinafter mentioned northeastwardly to Delaware avenue; thence, still on said terminal structure, and on the easternmost part of the viaduct, hereinafter mentioned, to be located on Delaware avenue, to the north side of M street northeast; thence northwardly still on Delaware avenue, crossing Florida avenue overhead, by means of a girder bridge, or by masonry arches, to the north side of said avenue; thence by a line, still northwardly, curving to the east, and crossing under New York avenue, by the most practicable route, in a general northeasterly direction, to a point on the north line of Montana avenue, as projected, and shown on plan filed as required by this Act, from which terminal point the Philadelphia, Baltimore and Washington Railroad Company, its successors and assigns, shall be, and is hereby, authorized to locate, construct, maintain, and operate a line of railroad, of two or more tracks, by the most practicable route, to a point of connection with its present railroad near Magruder Station, in the State of Maryland, and to acquire, from time to time, such lands between Montana and Florida avenues, and east of the present Metropolitan Branch of the Baltimore and Ohio Railroad, as it may need for sidings, switches, yard tracks, with suitable structures and appliances, and other proper corporate purposes in connection therewith, and to use the same accordingly, subject to the approval of the Commissioners of the District of Columbia; and a right of way one hundred feet in width for said line of railroad as it shall be located through and upon lands belonging to the Reform School of the District of Columbia is hereby granted to and vested in said Philadelphia, Baltimore and Washington Railroad Company, its successors and assigns, on such terms as the Attorney-General shall prescribe: *Provided, however,* That the portion of said line of railroad lying south of Florida avenue

within the limits of the city of Washington shall be used for passenger trains only, except in cases of temporary emergency, and then for a period not exceeding twenty-four hours, unless with the consent of the Commissioners of the District of Columbia.

JOINT CONSTRUCTION.

It is the intention of this Act that the portion of the line of railroad above authorized lying between the north line of Massachusetts avenue and the north line of Florida avenue, if constructed by said Philadelphia, Baltimore and Washington Railroad Company, shall be constructed jointly with the said terminal company, and, with the viaduct and elevated terminal carrying the same above or over the streets and avenues of the city, be continuous with the elevated terminal and viaduct of said terminal company; and in that case the cost of said joint works shall be borne by said railroad company and said terminal company in such proportions as they may agree on, or, in case of a disagreement, as may be determined by the supreme court of the District of Columbia in such manner as that court shall prescribe. If, however, the Philadelphia, Baltimore and Washington Railroad Company shall deem it expedient or advisable, and shall so elect, that the whole or any portion of the railroad hereby authorized south of the point hereinbefore designated, on the north line of Montana avenue, should be constructed and owned by said terminal company, then and thereupon the said Philadelphia, Baltimore and Washington Railroad Company shall acquire, by purchase, from the said Baltimore and Ohio Railroad Company one-half of the whole then issued capital stock of the terminal company, and be entitled to subscribe for and acquire equally with said Baltimore and Ohio Railroad Company all thereafter issued stock of said terminal

company; and, upon such election said terminal company shall have as full power and authority to locate, construct, maintain, and operate said line of railroad as it is possessed of with reference to the other works, specified in this Act, to be constructed by it, or which it is authorized to construct under the said Act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one.

UNION STATION.

SEC. 2. That the main passenger station and terminals for the accommodation of the passenger traffic of both the Baltimore and Ohio Rrailroad Company and the Philadelphia, Baltimore and Washington Railroad Company, and the passenger traffic of such other companies as may be moved over the railroads of either of said two companies, as provided in section eleven, shall be constructed by said terminal company within the area described as follows, namely:

Beginning on the north side of Massachusetts avenue at a distance of three hundred feet northwest from the west side of Delaware avenue measured at right angles thereto; thence by a line parallel with Delaware avenue and three hundred feet therefrom northeastwardly to a a point in the south line of I street northeast; thence by a straight line northeastwardly to a point in the intersection of the west line of Delaware avenue with the south line of L street northeast; thence eastwardly, along the south line of L street northeast, to a point in the intersection with the west line of Second street northeast; thence south, along the west line of Second street northeast, to a point about eighty feet north of the north line of H street northeast; thence by a line parallel with and distant three hundred feet measured at right angles thereto eastwardly from the east line of

Delaware avenue, southwestwardly to a point in the north line of Massachusetts avenue; thence by the said north line of Massachusetts avenue to the point of beginning.

The terminal station contemplated by this Act shall cost not less than four million dollars and shall be monumental in character, and the plans thereof shall be subject to the approval of the Commissioners of the District of Columbia.

And for the purposes of said passenger station and terminal said terminal company is fully authorized and empowered to acquire, take, and use all the lands and property lying within said area, or so much thereof as it may deem necessary: *Provided*, That on the westerly side of said railway station sufficient land for a street not less than forty feet in width shall be dedicated to the District of Columbia by the said railroad companies and said terminal company.

VIADUCT.

SEC. 3. That the viaduct leading northwardly from the passenger station and terminal between the south side of L street and the north side of M street may occupy so much of the bed of Delaware avenue as lies west of a line drawn parallel with the east building line of said avenue and forty feet westwardly therefrom: *Provided, however*, That said terminal station and viaduct shall be so constructed as to permit H, K, L, and M streets, and Florida avenue to be passed and continued under the same through openings or spaces of sufficient clearance to permit the use of said streets and avenues in the form and manner and of the dimensions shown and indicated on the plan and profiles agreed upon between the Baltimore and Ohio Railroad Company, the terminal company, and the Philadelphia, Baltimore and Washington Railroad

Company and the Commissioners of the District of Columbia, and filed in the office of the Engineer Commissioner; and the said terminal company shall also grade and pave the said passageways at the time of their construction to the satisfaction of the Commissioners of the District of Columbia, but thereafter the maintenance of the pavements and roadways shall be provided for as in the case of other public highways in the District of Columbia.

Said viaduct shall be of sufficient width to carry, in addition to the tracks authorized by said Act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one, such tracks as may be required to accommodate the traffic of the said Philadelphia, Baltimore and Washington Railroad Company, and one or more freight tracks for the Baltimore and Ohio Railroad Company to be located on the west side thereof.

YARDS AND SWITCHES FOR TERMINAL COMPANY.

Said terminal company is also expressly authorized and empowered, subject to the approval of the Commissioners of the District of Columbia, to acquire and become possessed of such lands in the District of Columbia, outside the city limits, as may be from time to time needed for the purpose, and thereon to construct, maintain, own, and operate yard tracks, switches, roundhouses, shops, and other structures to adequately accommodate the handling, shifting, housing, storing, cleaning, and repairing of the locomotives and cars of such companies as shall be entitled to use the said passenger station and terminal; and also to establish, maintain, and operate the necessary tracks connecting the same with the tracks on Delaware avenue: *Provided*, That said roundhouses and shops shall be located as designated

on plans to be approved by the Commissioners of the District of Columbia, and filed in the office of the Engineer Commissioner.

BALTIMORE AND OHIO FREIGHT TRAFFIC

SEC. 4. That in order to provide terminal facilities for the freight traffic of the Baltimore and Ohio Railroad Company in lieu of those which said company is now authorized to have within the area to be occupied by the passenger station and terminal, described in the Act relating to it, approved February twelfth, nineteen hundred and one, the said Baltimore and Ohio Railroad Company be, and it is hereby, authorized and empowered (in addition to the power and authority conferred upon it by the provisions of said Act relating to it, approved February twelfth, nineteen hundred and one) to locate, construct, maintain, and operate tracks, switches, sheds, warehouses, other structures, and facilities necessary or proper for a freight-delivery yard and terminal in Eckington, in, over, and upon the bed of Quincy street and Third street between New York avenue and R street, and in and upon the property bounded by New York avenue, Florida avenue, Eckington place, and R street, outside the limits of the city of Washington; and also within the city of Washington in, over, and upon the bed of Second street between M and N streets and in and upon squares seven hundred and eleven, seven hundred and twelve, and seven hundred and thirteen; and also to extend its tracks and switches north of V street on the east side of the main tracks of its Metropolitan Branch Railroad to Rhode Island avenue extended; and said company is hereby authorized to acquire, by purchase or condemnation, as provided in this Act, the lands and property necessary for the additional freight facilities above mentioned.

STREETS TO BE VACATED.

SEC. 5. That to accomplish the purposes of this Act the following-named streets, in addition to the streets vacated, abandoned, and closed by the provisions of said Act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one, are hereby vacated, abandoned, and closed, to wit: In Eckington, T street shall be closed between the west line of Seventh street and the right of way of the Metropolitan Branch of the Baltimore and Ohio Railroad Company; Thomas street from the west line of Seventh street westward; Seaton street from Sixth street to Seventh street; S street from Sixth street to the Brentwood road; Brentwood road from the west side of Seventh street to the south side of S street; Third street from the south side of R street to Florida avenue; Quincy street shall be closed and abandoned: *Provided*, That no streets or avenues shall be closed or abandoned under the provisions of this Act or of the Acts relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, until all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said Acts, shall have been acquired by said railroad company or companies or the terminal company referred to herein, either by condemnation or purchase, as hereinafter provided. No streets or avenues, except Ninth, Twelfth, and Fifteenth streets and New York avenue, shall be opened across the railroads constructed under authority of this Act between Florida and Montana avenues; and said Ninth, Twelfth, and Fifteenth streets, when and as opened, shall be carried above the railroads by suitable viaduct bridges, the cost whereof, with their approaches within the limits of the right of way, shall be paid by the terminal company, but shall be maintained as in the case of other public

highways in the District of Columbia: *Provided*, That the Baltimore and Ohio Railroad Company shall make adequate and suitable provision for carrying T street over the railroad right of way to the west line of Seventh street east in a manner satisfactory to the Commissioners. And the terminal company shall construct the necessary tunnels or viaducts to permit New York avenue to be carried with its full width between parking lines over their rights of way as herein authorized; and shall fill said avenue to a like width to the grade approved for said avenue for the purposes of this Act across said right of way and westward to Florida avenue, and shall support the sides of said avenue with embankments or retaining walls wherever it abuts upon property belonging to said railroad, and nothing contained in the provisions heretofore made for the vacating of Third street and Brentwood road across said avenue shall operate to close said avenue in any way as a public thoroughfare at its full established width: *And provided further*, That the Baltimore and Ohio Railroad Company shall dedicate to the District of Columbia the necessary land to widen Eckington place on its east side to its full width in accordance with the recorded plans for street extensions, and the Philadelphia, Baltimore and Washington Railroad Company shall dedicate to the District of Columbia the necessary land to form a western exit from Ivy street to Canal street as shown on the plan filed by said company as required by this Act. Also, in the city of Washington the following-named streets are hereby vacated, abandoned, and closed, to wit: Ivy street between South Capitol street and a point two hundred and twenty feet east thereof; Second street northeast, between N street and Delaware avenue, and, between the north side of M street and the south side of L street, so much of the bed of Delaware avenue as lies west of a line drawn parallel with the east building line of said avenue and forty feet westerly therefrom; also all parts of streets included within

the area of the terminal herein described, except H and K streets, it being the intention of this Act that all streets, avenues, ways and alleys within the area to be occupied and used for said terminal and terminal tracks shall be completely vacated, abandoned, and closed, and the use thereof and of any public reservation or street spaces of the United States within said area be granted to the company constructing such terminals for the purposes of the same, except that H and K streets shall be carried under said terminal and terminal tracks substantially in accordance with the plans agreed upon between the Baltimore and Ohio Railroad Company, the terminal company, and the Philadelphia, Baltimore and Washington Railroad Company and the Commissioners of the District of Columbia, and filed in the office of the Engineer Commissioner.

MASSACHUSETTS AVENUE PLAZA.

The Commissioners of the District of Columbia are hereby authorized and directed to cause all streets, avenues, ways, and alleys to be closed as provided in this Act, and in accordance with the intent thereof; and also to lay out a circle or plaza at the intersection of Massachusetts avenue and Delaware avenue, and to lay out and open streets leading to such circle, and to change the lines of certain other adjacent streets and of Ivy street, as shown on a plan filed in the office of the said Commissioner, and also to make such changes in the lines and grades of any existing street, avenue, or way and in the recorded plans of street extensions as may be reasonably required, deemed necessary, or advisable in the construction of the works hereby authorized. And authority is hereby given said Commissioners to acquire by purchase, or to condemn in accordance with existing law, the land necessary to carry out the proceedings authorized by this Act, and to reconstruct, grade, and

pave, by day labor or otherwise, the streets, avenues, and ways changed in line or grade or newly created hereunder.

And authority is hereby given the District Commissioners to sell or equitably exchange any portion of existing public space abandoned by reason of the adjustment of streets as an approach to the plaza or circle at Massachusetts avenue: *Provided*, That the provisions of section three of the Act of February twelfth, nineteen hundred and one, in relation to new terminals for the Baltimore and Ohio Railroad Company which vacate, abandon, and close D and E streets between First street and North Capitol street and Delaware avenue between C street and the south line of Massachusetts avenue be, and the same are hereby, repealed, and said streets are restored to the same status and ownership in all respects as they were prior to the passage of said Act.

DAMAGES.

All damages to adjacent property owners resulting from, incidental to, or connected with changes in the grades of the streets or alleys authorized by this Act shall be borne, paid for, and defrayed by the District of Columbia, and shall be recoverable by action of law against the said District on the part of the owners of the property so damaged. Fifty per centum of the amounts so recovered shall be refunded to the said District by the United States: *Provided*, That in determining the damages as herein provided the jury shall take into consideration any benefits that they may have accrued by reason of the elimination of grade crossings or of the location of said station in proximity to the property alleged to have been damaged.

TAXATION.

SEC. 6. That the property owned or occupied by the terminal company, or by the Philadelphia, Baltimore and Washington Railroad Company, or by the Baltimore and

Ohio Railroad Company under authority of this Act, or otherwise, together with the improvements that may be put thereon, shall be subject to taxation in the District of Columbia in the same manner and to the same extent as other property in the District, and all tracks and sidings shall be taxed as real estate: *Provided*, that no assessment, valuation, or tax shall be made, laid, or levied on the stations, terminals, and lines of railroad located, constructed, or maintained under the authority of this Act in excess of that which would or could be lawfully made, laid, or levied if said stations, terminals, and lines of railroad were located, constructed, and maintained without the use of bridges, tunnels, viaducts, retaining walls, or other structures necessary or properly employed to elevate or to depress the same as required by this Act; it being the true intent and meaning hereof that the lines of railroad and terminals hereby authorized shall be assessed and valued for the purpose of taxation and taxed on the same basis as if the same were not constructed and maintained by means of such bridges, tunnels, viaducts, retaining walls, and other structures: *Provided*, That such portions of the terminal structure or viaduct as may be constructed and used for storage or like commercial purpose shall be subject to taxation in the same manner as other property in the District of Columbia.

PLANS.

SEC. 7. That before any portion of the work of construction within the District of Columbia herein described shall be begun, plans thereof in accordance with the provisions of this Act shall be prepared by the company undertaking such work, and shall be submitted for approval to the Commissioners of the District of Columbia; also in so far as public parks and reservations may be affected, for approval also of the Secretary of War; and also in so far as underground construction is in-

volved, for approval also of the Superintendent of the Library of Congress. Duly authenticated copies of said plans shall, after approval, be filed with the Commissioners of the District of Columbia, and all work shall be done in accordance therewith. The company undertaking such work shall deposit with the collector of taxes such sums of money as the Commissioners of the District may reasonably require to cover the cost of District inspection.

LIMIT OF TIME FOR COMPLETION.

SEC. 8. That of the works herein described, the lines of railroad leading northward and southward from the main passenger station and terminal connecting the same with lines of the Baltimore and Ohio Railroad Company and lines of the Philadelphia, Baltimore and Washington Railroad Company, respectively, shall be completed, and the main passenger station and terminals shall be ready for occupancy, within five years from the date of the passage of this Act. The construction of said passenger station and terminal and viaduct by said terminal company, in accordance with the provisions of this Act, shall be deemed and taken to be a full compliance by the Baltimore and Ohio Railroad Company with the requirements in that regard of the said Act relating to it, approved February twelfth, nineteen hundred and one, and the respective periods of five and six years from the passage of said Act, as mentioned in section eight thereof, are hereby extended respectively for five and six years from the passage of this Act. Except as modified by this Act, all the provisions of said Act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one, shall be and remain in full force and effect.

REMOVAL OF TRACKS FROM THE MALL.

The construction of the lines of railroad hereinbefore mentioned, connecting the railroad of said Philadelphia, Baltimore and Washington Railroad Company with said

main passenger station and terminal, whether constructed wholly by said Philadelphia, Baltimore and Washington Railroad Company or said terminal company, or partly by each, shall relieve said Philadelphia, Baltimore and Washington Railroad Company of any and all duties and obligations respecting relocation of its present passenger tracks and terminal, and location, construction, and operation of new passenger station and new terminal tracks, as prescribed in the Act relating to the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one; and upon completion either by said Philadelphia, Baltimore and Washington Railroad Company or said terminal company, or in part by one and in part by the other, of said connecting lines of railroad ready for use, in connection with said main passenger station and terminal, as contemplated by this Act, and within five years from the passage of this Act the said Philadelphia, Baltimore and Washington Railroad Company shall be, and is hereby, required to remove its present eastern connection between its passenger station and its line on Virginia avenue via Sixth street, including the tracks on Sixth street, and its western connection via Maryland avenue, and to convey its passenger station building to the United States. And in consideration thereof, and of the relinquishment and surrender by said Philadelphia, Baltimore and Washington Railroad Company of its right to occupy and use the portion of the Mall, and to maintain thereon a new passenger station and terminals, granted to the Baltimore and Potomac Railroad Company by the Act aforesaid, in consideration of and as a contribution toward the large expenditures to be made by said company in the relocation and improvement of its line of railroad and elimination of grade crossings resulting therefrom, as required by said Act, the sum of one million five hundred thousand dollars shall be paid to said Phila-

delphia, Baltimore and Washington Railroad Company, its successors and assigns, out of any moneys in the Treasury of the United States not otherwise appropriated, and said sum of one million five hundred thousand dollars is hereby expressly appropriated for this purpose, and shall be paid upon presentation of a certificate by the Commissioners of the District of Columbia that said passenger station and terminal and connecting lines of railroad contemplated by this Act are ready for occupancy. Except as modified by this Act, all provisions of said Act relating to the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, and all rights, powers, remedies, and processes thereby conferred on said last-named company, or upon Southern Railway Company, shall remain and continue in full force, and with like effect as if herein re-enacted at length; and all rights, powers, and privileges granted to, or duties imposed upon, said Philadelphia, Baltimore and Washington Railroad Company by this Act shall accrue to and devolve upon its successors and assigns, as provided with respect to the Baltimore and Potomac Railroad Company by section fifteen of said Act relating to said Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, and all provisions of said section shall be applicable thereto in all respects, and in like manner as they are made applicable to the rights, privileges, and duties granted to or imposed upon said company by said last-mentioned Act.

CONDEMNATIONS.

SEC. 9. That in the execution of the powers conferred by this Act, or by either of said before-mentioned Acts, approved February twelfth, nineteen hundred and one, by the terminal company, the Philadelphia, Baltimore and Washington Railroad Company, or the Baltimore

and Ohio Railroad Company, each of said companies may acquire, by purchase or condemnation, the lands and property necessary for all and every the purposes contemplated by each of said last-mentioned Acts and this Act respectively; and such condemnation shall be effected in the manner and by the methods and processes provided by sections six hundred and forty-eight to six hundred and sixty-three, both inclusive, of the Revised Statutes relating to the District of Columbia, which said sections, despite any repeal thereof, are hereby continued in full force and effect, and, for the purposes contemplated by this section, are hereby specially enacted with like effect as if the same were incorporated herein at length: *Provided*, That in every case wherein an assessment of damages or an award shall have been returned by the appraisers the company, upon paying into court the amount so assessed or awarded, may enter upon and take possession of the land and property covered thereby, irrespective of whether exceptions to said assessment or award shall be filed or not, and the subsequent proceeding shall not interfere with or affect such possession, but shall only affect the amount of compensation to be paid: *And provided further*, That any property owner whose land is included within such location shall have the right, within two years, to begin proceedings to compel the appropriation of said land by said company and the payment of damages in the same manner as if the proceedings had been instituted by the company under the provisions of this Act.

The said terminal company, in respect of the additional works hereby authorized to be undertaken by it, shall be vested with and may exercise all the powers, authorities, rights, and privileges granted by the provisions of sections six hundred and eighteen to six hundred and seventy-six, both inclusive, of the Revised Statutes

relating to the District of Columbia, to the same extent as if said provisions were fully set forth and enacted herein, and shall also be vested with and enjoy all the powers, authorities, rights, and franchises conferred or granted by said Act relating to the Baltimore and Ohio Railroad Company, approved February twelfth, nineteen hundred and one, except the power to sell all its railroad and works and property to the Baltimore and Ohio Railroad Company, as provided in said last-mentioned Act: *Provided, however,* That the Philadelphia, Baltimore and Washington Railroad Company shall have the right to acquire, own, and hold one-half of the capital stock of said terminal company, whether now or hereafter issued, and said Baltimore and Ohio Railroad Company shall make necessary transfers thereof accordingly.

POWER TO CONTRACT.

The Baltimore and Ohio Railroad Company, the Philadelphia, Baltimore and Washington Railroad Company, and the said terminal company shall have power to contract each with the other, or with both the others, or with any other railroad company or companies whose passenger traffic may be moved over the railroads of either of said two railroad companies as provided in section eleven, in regard to the construction, maintenance, use, or operation of any line or lines of railroad, terminals, terminal tracks, stations, or other works or properties, held, owned, or possessed by any of said companies within the District of Columbia, or authorized so to be, or for the lease of the same upon such terms as may be agreed upon between the parties to any such contract. Said terminal company shall also have the right and power, exercisable at any time, to sell and convey, either to the Baltimore and Ohio Railroad Company or to the Philadelphia, Baltimore and Washington

Railroad Company, so much of the line of railroad constructed by the said terminal company under the authority of this Act, north of the north line of Florida avenue, as may be set apart for the exclusive use of the traffic of either of said railroad companies by their mutual consent.

MAGRUDER STATION LINE.

SEC. 10. That in the location, construction, and maintenance of the connecting line of railroad which the Philadelphia, Baltimore and Washington Railroad Company is by this Act authorized and empowered to locate, construct, maintain, and operate, from the point hereinbefore mentioned on the north line of Montana avenue to a point of connection with its railroad near Magruder Station, in the State of Maryland, said Philadelphia, Baltimore and Washington Railroad Company shall have, be possessed of, and exercise the powers and processes of condemnation as prescribed by section nine of this Act, and also all authorities, rights, powers, privileges, and franchises conferred upon or vested in the Baltimore and Ohio Railroad Company by the twelfth section of said Act relating to it, approved February twelfth, nineteen hundred and one, in respect to the line of railroad therein authorized, and shall be subject to the same limitations and restrictions as in said twelfth section set forth.

INTERSECTING HIGHWAYS.

Any and all streets or highways within the District of Columbia now or hereafter planned or projected to cross any line of steam railroad in the District of Columbia, which may be hereafter opened to public use, shall be located, constructed, and maintained either beneath such railroad by a suitable subway, or above the same

by a suitable viaduct bridge at such altitude as will not interfere with the free and safe operation thereof. The cost and expense of opening said streets or highways within the limits of such railroad company's right of way, including the cost of constructing the portion of any viaduct bridge, within said limits, shall be borne and paid half by such railroad company, its successors and assigns, and half by the District of Columbia and the United States, but after construction the cost of maintenance shall be wholly borne and paid as in the case of other public highways in the District of Columbia; and the portions of such streets now or hereafter planned or projected as above which lie within a right of way belonging to such railroad company shall be dedicated by such company as a public thoroughfare when the portions of such street adjoining such right of way have been similarly dedicated or otherwise acquired.

SEC. 11. That any railroad company now or hereafter lawfully existing and authorized to extend a line of railroad into the District of Columbia, or having secured the right to operate over the lines of any other then existing railroad, to a point of connection with the tracks of said terminal company, shall have the right to the joint use of said station and terminals upon the payment of a reasonable compensation for the use of the same; and if the parties be unable to agree upon such terms, then the same shall be prescribed by the supreme court of the District of Columbia, upon petition of either party in interest, under such rules of procedure as the said court shall prescribe.

SEC. 12. That the Philadelphia, Baltimore and Washington Railroad Company shall establish and maintain a substation with suitable accommodation for passenger travel at a convenient location north of the Long Bridge and at a point to be approved by the Commissioners of the District of Columbia.

AMENDMENT AND REPEAL.

SEC. 13. That Congress reserves the right to alter, amend, or repeal this Act.

Approved, February 28, 1903.

SECTIONS OF THE REVISED STATUTES OF THE UNITED STATES RELATING TO THE DISTRICT OF COLUMBIA, RE-ENACTED BY THE PRECEDING ACTS.

NOTE.—*All the following sections, 618 to 676, are made applicable to the Terminal Company, but only sections 648 to 663 are made applicable to the Baltimore and Ohio Railroad Company, the Baltimore and Potomac Railroad Company, and to condemnation proceedings by any company.*

SEC. 618. Any number of persons, not less than seven, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning, and maintaining such railroad, by complying with the following requirements, namely:

First. Whenever stock to the amount of at least fifty thousand dollars shall have been subscribed, and five per cent. upon such subscription shall actually have been paid in, the subscribers to such stock shall elect directors for the company from among their own number, and shall severally subscribe articles of association in which shall be set forth—

First. The name of the corporation;

Second. The amount of the capital stock of the company;

Third. The number of shares of which said stock shall consist;

Fourth. The number of directors to manage the affairs of the company, and their names;

Fifth. The point or place from which the proposed railroad is to be constructed, and its length, as near as may be.

Second. Each subscriber to such articles of association shall state his place of residence, and the number of shares taken by him in such company.

Third. The articles of association shall be filed in the clerk's office of the recorder of deeds of the District, and be recorded in a book kept for that purpose.

SEC. 619. Upon filing the articles of association in accordance with the provisions of the preceding section, the persons who shall have subscribed the same, and all persons who shall from time to time become stockholders in such company, and their successors, shall be a body politic and corporate, in perpetuity, by the name stated in such articles of association, and shall be capable of suing and being sued, and may have a common seal, and may make and alter the same at pleasure, and shall be capable in law of purchasing, holding, and conveying any real or personal property, whatever necessary for the construction of such road, and for the erection of all necessary buildings and yards and appurtenances for the use of the same.

SEC. 620. A copy of any articles of association filed in pursuance of section six hundred and eighteen, and certified to be a copy by the recorder of deeds, shall, in all courts and places, be *prima facie* evidence of the incorporation of such company and of the facts stated therein.

SEC. 621. The directors named in section six hundred and eighteen, shall open books for subscription to the capital stock of the company at such times and in such places as a majority of them may direct, thirty days' notice of which shall be given by publication in some daily paper published in the District.

SEC. 622. In case a greater amount of stock shall be subscribed than the whole capital stock required by the company, the directors shall distribute the capital stock so subscribed as equally as possible among the subscribers; but no share shall be divided in making such distri-

bution, nor shall a greater number of shares be allotted to any one subscriber than subscribed for by him.

SEC. 623. There shall be an annual meeting of the stockholders at the office of the company for the election of directors to serve for the ensuing year, notice of which shall be given by the directors chosen as provided in section six hundred and eighteen, for the first annual election, and afterward by their successors in office, which notice shall be published not less than twenty days previous thereto, in a newspaper published in the city of Washington.

SEC. 624. Three judges of election shall be chosen by the board of directors previous to any such annual meeting, who shall be stockholders, but not directors, at the time of the election, whose duty it shall be to receive the votes of the stockholders at such election for directors, and to openly count the votes and declare the result.

SEC. 625. The judges of election shall furnish the directors elected at such meeting of stockholders with a certificate of their election, which certificate shall be evidence of their authority to act as such directors.

SEC. 626. There shall be not less than seven nor more than thirteen directors. No person shall be a director unless he shall be a stockholder and qualified to vote for directors at the election at which he shall be chosen. The directors shall hold their offices one year, and until others are elected and qualified.

SEC. 627. Directors shall be chosen at the annual meeting of stockholders by ballot, and by a majority of the votes of the stockholders present, in person or by proxy; and every such stockholder being so present at any election of directors, shall be entitled to give one vote for every share of stock which he may have owned for ten days next preceding such election; but no stockholder

shall vote at any such election upon any stock except such as he shall have owned for ten days.

SEC. 628. In case it shall happen at any time that an election of directors shall not be made on the day designated by the by-laws of the company when it ought to have been made, the company for that reason shall not be dissolved if within ninety days thereafter they shall hold an election for directors in such manner as the by-laws of the company shall provide.

SEC. 629. Meetings of the stockholders may be called at any time during the interval between the annual meetings by the directors, or by the stockholders owning not less than one-fourth of the stock, by giving thirty days' public notice of the time and place of the meeting.

SEC. 630. When any such meeting is called by the stockholders, the particular object of the meeting shall be stated in the notice, and, if at any meeting thus called a majority in value of the stockholders are not represented in person or by proxy, such meeting shall be adjourned from day to day, not exceeding three days, without transacting any business, and if within such three days stockholders having a majority of the stock do not attend, the meeting shall be dissolved.

SEC. 631. The directors shall have power to make by-laws for the management and disposition of stock, property, and business affairs of such company, and prescribing the duties of the officers, artificers, and servants that may be employed, and for the appointment of all the officers for carrying on all the business within the object and purposes af the company.

SEC. 632. There shall be a president of the company, who shall be chosen by and from the directors, and also such subordinate officers as the company by-laws may designate, who may be elected or appointed, and required to give such security for the faithful performance

of the duties of their offices as the company by its by-laws may require; but nothing contained in this section shall be so construed as to prevent the stockholders from removing a president in the manner prescribed in the following section.

SEC. 633. At all general meetings of the stockholders of any such company, a majority in value of such stockholders may remove any president or any director, and elect others in their stead; but notice of such intended removal shall have been given as required in section six hundred and twenty-three and six hundred and twenty-eight.

SEC. 634. At each regular meeting of the stockholders of any such corporation it shall be the duty of the president and directors, in office for the preceding year, to exhibit a clear and distinct statement of the affairs of the company.

SEC. 635. At any meeting of the stockholders a majority of those present, in person or by proxy, may require similar statements from the directors, whose duties it shall be to furnish them when required.

SEC. 636. The stock of such company shall be deemed personal estate, and shall be transferable only on the books of the company; but no shares shall be transferable until all previous calls thereon shall have been fully paid, or the shares shall have been forfeited for the non-payment of calls thereon.

SEC. 637. It shall be lawful for the directors to call in and demand from the stockholders, respectively, any sums of money by them subscribed, in such payments or installments as the directors shall deem proper, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholders within thirty days after personal demand or notice requiring such payment; but subscriptions shall not be required to be

paid except in equal installments of not more than ten per centum per month.

SEC. 638. The president and a majority of the directors, within thirty days after the payment of the last installment of the capital stock as fixed and limited by the company, shall make a certificate stating the amount of capital stock so fixed and paid in, which certificate shall be signed by the president and a majority of the directors, and sworn to by the president and secretary; and they shall, within the said thirty days, file and record the same in the office of the recorder of deeds of the District.

SEC. 639. The capital stock of such companies may be increased from time to time, if necessary, in the manner provided in the following section, to a sum equal to the cost of constructing the road, together with the right of way and motive-power, and all the appurtenances and expenses necessary for the complete running of the road.

SEC. 640. Such increase may be made only by filing in the office of the recorder of deeds a certificate stating the amount of the desired increase, and the reasons or necessity for the same signed by the president and a majority of the directors, and attested by the secretary and seal of such company.

SEC. 641. In no case shall the capital stock of any such company be increased to a greater amount than the actual cost of building and equipping the road.

SEC. 642. It shall be lawful for all companies formed and incorporated under the provisions of this chapter to sue for and collect any installment or subscription to stock due to said companies in like manner as other debts are now collected.

SEC. 643. Every such corporation shall possess the general powers and be subject to the liabilities and restrictions in the special powers following, that is to say:

First. To cause such examination and survey for the

proposed railroad to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purpose, by their officers, agents, and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which they shall do thereto.

Second. To receive, hold, and take such voluntary grants and donations of real estate, and other personal property, as shall be made to it, to aid in the construction, maintenance, and accommodation of such railroad; but the real estate thus received by voluntary grants shall be held and used for the purposes of such grants only.

Third. To purchase, and by voluntary grants and donations receive and take, and by its officers, engineers, and surveyors and agents, enter upon, and take possession of, and hold and use all such lands and real estate, and other property as may be necessary for the construction and maintenance of its railroad and stations, depots, and other accommodations necessary to accomplish the objects for which the corporation was created; but not until the compensation to be made therefor, as agreed upon by the parties, or ascertained as prescribed in this chapter, shall have been paid to the owner or owners thereof, or deposited as hereinafter directed, unless the consent of such owner be given to enter into possession.

Fourth. To lay out its road, not exceeding six rods wide, and to construct the same; and for the purpose of cuttings, embankments, and procuring stone and gravel, may take as much more land within the limits of its charter, in the manner hereafter provided, as may be necessary for the proper construction and security of the road.

Fifth. To construct its road upon any street, or across any stream of water, water-course, road, highway, railroad, or canal, so as not to interfere with the free use of

the same, which the route of its road shall intersect, in such manner as to afford security for life and property, but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to have unnecessarily impaired its usefulness or injured its franchises.

Sixth. To cross, intersect, join, and unite with any other railroad before constructed on any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences, in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points or manner of such crossings and connections, the same shall be ascertained or determined by commissioners, to be appointed as is provided in this chapter in respect to taking of lands; but this section is not to affect the rights or franchises heretofore granted.

Seventh. To purchase lands necessary for the use of the road or take them; and may change the line of its road whenever a majority of the directors shall so determine, as provided in this chapter; but no such change shall vary the general route of the road.

Eighth. To take, transport, carry, and convey persons and property on its railroad by the force or power of steam, of animals, or any mechanical power, or by any combination of them, and to receive compensation therefor.

Ninth. To erect and maintain all necessary and convenient buildings, stations, depots, and fixtures, and machinery for the accommodation and use of its

passengers, freight, and business, and obtain and hold the lands therefor.

Tenth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor.

SEC. 644. Every such company, before constructing a part of its road, shall make a map and profile of the route intended to be adopted, which shall be certified by a majority of the directors, and filed in the office of the recorder of deeds of the District, for the inspection and examination of all parties interested.

SEC. 645. If at any time after the location of the track of such road, in whole or in part, and the filing of the map thereof, it shall appear to the directors of the company that the line thereof may be improved, such directors may, from time to time, alter the line, and cause a new map to be filed in the recorder's office, and may thereupon take possession of the lands embraced in such new location that may be required for the construction and maintenance of the road on such new lines, either by agreement with the owner or by such proceedings as are authorized under the provisions of this chapter, and use the same in place of the line for which the new is substituted.

SEC. 646. Whenever the track of such railroad shall cross a road or highway such road or highway may be carried under or over the track, as may be most expedient; and in all cases where an embankment or cutting shall make a change in the line of such road or highway desirable, with a view to a more easy ascent or descent, the company may take additional lands for the construction of such road or highway or such new line as may be deemed requisite by the directors.

SEC. 647. Unless the lands so taken shall be purchased or voluntarily given for the purposes mentioned in the

preceding section, compensation therefor shall be ascertained in the manner provided in this chapter as nearly as may be, and duly made by such corporation to the owners and persons interested in such lands, and the same, when so taken and compensation made, to become part of such intersecting road or highway, in such manner and by such terms as the adjacent parts of such highway may be held for highway purposes.

SEC. 648. In case any company formed under this chapter is unable to agree for the purchase of any real estate required for the construction of the track, turn-outs, and water-stations, it shall have the right to acquire the title to the same in the manner and by the special proceedings prescribed in this chapter.

SEC. 649. Such company is authorized to enter upon any land for the purpose of examining and surveying its railroad-line, and may appropriate so much thereof as may be deemed necessary for its railroad, including necessary side-tracks and water-stations, materials for constructing, except timber, a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts, and the right of making proper drains.

SEC. 650. The corporation shall forthwith deposit with the clerk of the supreme court of the District a description of the rights and interests intended to be appropriated, and such land, rights, and interest shall belong to such company, to use for the purpose specified, by making or tendering payment as hereinafter provided.

SEC. 651. The corporation may, by its directors, purchase any such lands, materials, right of way, or interest of the owner of such lands; or in case the same is owned by a person insane, or an infant, at a price to be agreed upon by the regularly-constituted guardian or parent of said insane person or infant, if the same shall be appraised

by the court, and on such agreement and approval, the owner, guardian, or parent, as the case may be, shall convey the premises, so purchased, in fee simple or otherwise, as the parties may agree to such railroad company; and the deed, when made, shall be deemed valid in law.

SEC. 652. If the corporation shall not agree with the owner of the land, or with his guardian if the owner is incapable of contracting, touching the damages sustained by such appropriation, the corporation shall deliver to such owner or guardian a copy of the instrument of appropriation.

SEC. 653. If the owner, or his guardian in case such owner is incapable of contracting, be unknown, the corporation shall publish in some newspaper in the District, to be designated by the court, for the term of six weeks, an advertisement reciting the substance of such instrument of appropriation.

SEC. 654. Upon fixing such act of appropriation and delivering such copy, or making such publication, the supreme court for the District upon the application of either party, shall appoint by warrant three disinterested freeholders of the neighborhood on which the land lies, to appraise the damages which the owner of the land may sustain by such appropriation.

SEC. 655. The appraisers shall be duly sworn, and they shall consider the injury which such owner may sustain by reason of such railroad, and shall forthwith return their assessment of damages to the clerk of the court, setting forth the value of the property taken, or injury done to the property, which they assess to the owner, or owners separately, to be by him filed and recorded.

SEC. 656. The corporation shall pay to said clerk the amount thus assessed, or tender the same to the party in whose favor the damages are awarded or assessed, and on making payment or tender thereof, in the manner herein

required, it shall be lawful for such corporation to hold the interests in such lands or materials on said roadway within fifty feet on each side of the center of such roadway, for the uses aforesaid.

SEC. 657. The cost of the award shall be paid by such company; and on notice by any party interested and showing said proceedings, the court may order the payment thereof and enforce such payment by execution.

SEC. 658. The award of the arbitrators may be reviewed by the court, in which such proceedings may be had, on written exceptions filed by either party, in the clerk's office, within ten days after the filing of such award, and the court shall take such order therein as right and justice may require, by ordering a new appraisement, on good cause shown.

SEC. 659. Notwithstanding such appeal, the company may take possession of the property described as aforesaid, and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed, if prior to the assessment the corporation shall tender to such owner or guardian and in case of refusal to receive the same shall pay into court, if he be unable to contract, an amount equal to the award afterward made, exclusive of costs.

SEC. 660. The costs of arbitration shall be paid equally by such company and such owner or guardian.

SEC. 661. If there are any adverse or conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into court by the company until it can determine who is entitled to the same, and shall direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts in which such determination and order are to be made.

SEC. 662. The court shall appoint some competent

attorney to appear for and protect the rights of any party in interest who is unknown, or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent; the court shall also have power, at any time, to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added, and to direct such further notice to be given to any party in interest as it deems proper, and also to appoint other commissioners in the place of any who shall die, or refuse, or neglect, or are unable to serve, or who may leave or be absent from the District.

SEC. 663. At any time after an attempt to acquire title by appraisal of damages, or otherwise, if it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect the same in the same manner as if no appraisal had been made; and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession to take possession of, and use such real estate during the pendency and until the final conclusion of such new proceedings and may stay all actions and proceedings against the company, or any officer or agent or workmen of such company, on account thereof, on such company paying into court a sufficient sum, as the court may direct, to pay the compensation therefor, when finally ascertained; and in every such case the party interested, in real estate may conduct the proceedings to a conclusion, if the company delays or omits to prosecute the same.

SEC. 664. Such company may, from time to time, borrow such sums of money as they may deem necessary for completing or operating their railroad, and issue and dispose of their bonds for any amounts so borrowed, for such sums and at such rates of interest as may be agreed

upon, and mortgage their corporate property and franchises to secure the payment of any debt contracted by the company; and the directors of the company may confer on any holder of any bond issued for money so borrowed the right to convert the principal due or owing thereon into stock of the company, at any time not exceeding fifteen years from the date of such bond, under such regulations as the company may adopt; and the company may sell their bonds whenever they may deem proper, and such sales shall be as valid as if such bonds should be sold at par value. But such corporation shall not have power to issue any bonds or execute any mortgages upon its property or franchises until at least one-half of the capital stock shall have been fully paid.

SEC. 665. Every such corporation shall make an annual report to the clerk of the supreme court of the District of the operations of the year ending on the first day of January, which report shall be verified by the oath of the treasurer and acting superintendent of operations, and filed in his office by the tenth day of January of each year, and shall state—

First. The capital stock and the amount actually paid in.

Second. The amount expended for the purchase of lands, for the construction of the road, for buildings, and for engines and cars respectively.

Third. The amount and nature of its indebtedness, and the amounts due the corporation.

Fourth. The amount received for the transportation of passengers, of property, of mails, and from other sources.

Fifth. The amount of freight, specifying the quantity, in tons, of the products of the forest, of animals, of vegetables, food, other agricultural products, manufactures, merchandise and other articles.

Sixth. The amount paid for repairs, engines, cars, buildings, and salaries.

Seventh. The number and amount of dividends, and when paid.

Eighth. The number of engine-houses and shops, of engines and cars and their character.

SEC. 666. Any such corporation shall, when applied to by the Postmaster General, convey the mails of the United States on their road; and in case such corporation shall not agree to the rates of transportation thereof. and as to time, rate of speed, manner, and condition of carrying the same, the said supreme court may appoint three commissioners, who shall fix and determine the same.

SEC. 667. In forming a passenger train, baggage, or freight or merchandise, or lumber cars shall not be placed in rear of passenger cars; and if any of them shall be so placed, and any accident shall happen to life or limb, the officer or agent who so directed or knowingly suffered such arrangement, and the conductor or engineer of the train, shall each and all be held guilty of intentionally causing the injury and be punished accordingly.

SEC. 668. Every such corporation shall start and run their cars for the transportation of persons or property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer, or be offered, for transportation at the place of starting, and the junction of other railroads, and at siding and stopping places established for receiving and discharging way passengers and freight, and shall take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor.

SEC. 669. In case of the refusal by such corporation or

their agents to take and transport any passenger or property, as provided in the preceding section, or to deliver the same at the regularly appointed place, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit.

SEC. 670. If any passenger shall refuse to pay his fare or toll, the conductor of the train may put him out of the cars at any usual stopping place.

SEC. 671. Every conductor, baggage-master, engineer, brakeman, or other employé of any such railroad corporation, employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office, and the initial letters of the style of the corporation by which he is employed.

SEC. 672. No collector or conductor without such badge shall demand, or be entitled to receive, from any passenger any fare, toll, or ticket, or exercise any of the powers of his office; and no other of said officers or employés without such badge shall have any authority to meddle or interfere with any passenger or property.

SEC. 673. No railroad shall be built under the provisions of this chapter until the route and termini of such road shall have been approved and sanctioned by Congress.

SEC. 674. Congress may make all needful rules and regulations for the operation and management of such railroads, and may regulate the rates of fare and freight upon all such roads.

SEC. 675. Nothing contained in this chapter shall be so construed as to authorize any corporation organized under the same to construct or own any railroad outside of the District of Columbia, nor to limit the right of the District authorities to regulate the running of trains, or to establish the grade upon which such roads shall be built within the cities of Washington and Georgetown.

SEC. 676. Congress may, at any time, alter, amend, or repeal this chapter, saving and preserving all rights which may become vested under the same, and may amend or repeal any incorporation formed or created under this chapter; but any such amendment or repeal shall not, nor shall the dissolution of any company formed under this chapter, take away or impair and remedy given against any such corporation, its stockholders, or officers, for any liability which shall have been previously incurred.

[16092.]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 59.

FRANCIS WINSLOW, AUGUSTUS JAY, AND AMERICAN SECURITY AND TRUST COMPANY, TRUSTEES, AND KATE LA MONTAGNE, HARRIET WINSLOW, AND ELIZABETH P. PATTERSON, PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of Facts.

On August 22, 1904, the Baltimore and Ohio Railroad Company, in accordance with the provisions of the act of Congress approved February 28, 1903 (32 Statutes, 916), and the other acts of Congress therein referred to for the purpose of providing facilities for passenger and freight traffic, right of way, and approaches to freight and passenger terminals, filed its instrument of appropriation to acquire a part of the tract of land located in

the county of Washington and District of Columbia, and known as "Youngsborough" and described as follows:

> "Beginning at the northeast corner of Florida avenue and Brentwood Road, thence in a northeasterly direction along the easterly side of said Brentwood Road ninety-three (93) feet, more or less, to an angle in the easterly line of said road; thence northeasterly along said east line to a point eighty (80) feet distant, measured on a radial line from the center line between the Pennsylvania and Baltimore and Ohio main tracks as they will be constructed across said Brentwood Road, said center line being the three (3) degree curve shown in red on blue print hereto attached; thence southerly on a line parallel and eighty (80) feet distant from the said above-mentioned center line a distance of two hundred and forty-four (244) feet, more or less, to the north line of said Florida avenue; thence in a northwesterly direction along the northerly line of said Florida avenue a distance of one hundred and three (103) feet, more or less, to place of beginning. The above described tract to be used for right of way purposes.
>
> "Also a strip of ground fifty (50) feet wide east of and immediately adjoining the parcel above described, and extending from the easterly line of said Brentwood Road to the northerly line of Florida avenue. The last-mentioned parcel to be used for relocating and changing of said Brentwood Road; said relocation and change of said road on and over the fifty-foot strip herein described being desired and necessary because of the impracticability of carrying said road over or under the tracks of the said company crossing said road north of Florida avenue."

Both of these tracts are indicated upon the plat marked "Exhibit B" and attached to page 4 of the record, the first piece being the triangle included between the two blue lines on the west and south and the

red line on the east, and part numbered two being the 50-foot strip immediately east thereof.

To this instrument of appropriation the respondents filed their answer (Rec., pp. 6 to 9), denying—

First. Any right or authority in the company to acquire by condemnation the lands described in the instrument of condemnation.

Second. Denying in the petitioner right or authority to acquire by condemnation to its own use this part of the land of the respondents containing less than ¾ of an acre without also condemning to its use the residue of the tract, consisting in all of about 90 acres, and,

Third. Denying the right to the company to continue open to public use as a public highway and as a deflection or continuation of Brentwood Road a portion of the land of respondents, as set forth in its petition and instrument of appropriation.

On consideration of the bill and answer three appraisers were appointed to appraise the damages according to law. These appraisers were instructed by the court (Rec., p. 11). Testimony was taken, a report of which is contained in the record, pages 15 to 53 inclusive of record, and on November 21, 1904, the report of the appraisers was filed (Rec., pp. 13, 14 and 15), which concluded as follows:

"We appraised the value of the strip of land at the intersection of Florida Ave., Delaware Ave., and Brentwood Road, known as the Patterson estate, containing 27,225 square feet of land, at $1.30 per ft	$35,392.50
"The injury and damage to the remaining part of the tract as named	10,000.00
Total	$45,392.50"

On November 29th the respondents filed what is designated as a bill of exceptions (Rec., p. 54). On November 30, 1904, the Baltimore and Ohio Railroad Company filed exceptions to the appraisers' award (Rec., p. 55), and on March 31, 1905 (Rec., p. 56), the exceptions to the appraisers' award were withdrawn. No exceptions to the appraisers' award were at any time filed by the respondents. On April 19, 1905 (Rec., p. 56), the respondents filed a paper withdrawing and abandoning "all of the objections by them heretofore made to these proceedings, save and except the objection that the petitioner is not authorized to acquire by condemnation to its use the part of the land in respondents' answer described without also condemning to its use the entire tract, and the further objection that the petitioner is not authorized to continue open to public use as a public highway and as a deflection or continuation of the Brentwood Road a portion of the land of respondents, as set forth in its petition and instrument of appropriation."

On April 20, 1905, the award of the appraisers as made was confirmed by the court (Rec., p. 57). On the same day an order was made by the court directing the clerk to pay over to the respondents' solicitor, William G. Johnson, the sum of $35,392.50, the amount of the appraised value of the land of the respondents described in the instrument of appropriation as fixed by the return of the appraisers. *This order was made on motion of respondents.* On April 27, 1905, the respondents filed notice of appeal to this court (Rec., p. 58), in words, as follows, and to which especial attention is directed:

> "Come now the respondents herein and note an appeal to the Court of Appeals of the District of Columbia from so much of the decree of April twentieth, 1905, confirming the return and award of the appraisers herein, as fails to require the petitioner, The Baltimore and Ohio Railroad Com-

pany, to acquire the entire tract of land described in the answer of the respondents herein, and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation."

In the Court of Appeals of the District of Columbia, at its October term, 1905, the appellee railroad company moved to dismiss the appeal for the reasons:

(1) That no right of appeal was provided by the statute in such cases.

(2) That no written exceptions to the award had been filed by appellants in the Supreme Court of the District, and

(3) That appellants, by their own motion having received and accepted the sum of $35,392.50 found by the appraisers to be the value of the parcel of ground condemned in these proceedings, were barred and estopped from prosecuting and maintaining an appeal.

The cause being heard on the motion to dismiss and upon its merits, the Court of Appeals, in its opinion rendered in June at its April term, 1906, by Mr. Justice McComas (Rec., pp. 65 to 78, inclusive), overruled the motion to dismiss, but affirmed the final order or decree of the court below. To review this judgment the appellants sued out a writ of error from this court.

POINTS AND AUTHORITIES ON RIGHT OF APPEAL.

THE APPEAL NOTED IN THIS CASE SHOULD HAVE BEEN DISMISSED BECAUSE—

FIRST. THERE IS NO RIGHT OF APPEAL PROVIDED BY THE STATUTE AUTHORIZING THESE PROCEEDINGS, WHICH STATUTE WAS PASSED SUBSEQUENT TO THE ACT DEFINING THE JURISDICTION OF THE COURT OF APPEALS.

SECOND. THE ACT REFERRED TO PROVIDES THAT THE AWARD MAY BE REVIEWED BY THE COURT IN WHICH SUCH PROCEEDINGS MAY BE HAD ONLY UPON WRITTEN EXCEPTIONS FILED WITHIN TEN DAYS AFTER THE AWARD, AND NO EXCEPTIONS TO SUCH AWARD WERE EVER FILED BY THE PLAINTIFFS IN ERROR.

THIRD. THE PLAINTIFFS IN ERROR UPON THEIR OWN MOTION, HAVING RECEIVED AND ACCEPTED THE SUM OF $35,392.50, BEING A PART OF THE AWARD, CAN NOT MAINTAIN THIS APPEAL.

I.

By sections 650 and 654 of the Revised Statutes of the District of Columbia, re-enacted by and made a part of the act of February 28, 1903, proceedings for the condemnation of land in the District of Columbia by the defendant in error were authorized in and limited to the Supreme Court of the District of Columbia, and the right of appeal from the award is provided for in sections 658 and 659 of said Revised Statutes as follows:

> "The award of the arbitrators may be reviewed *by the court in which such proceedings may be had* on written exceptions filed by either party in the clerk's office within ten days after the filing of said award, and the court shall take such order therein as right and justice may require, by ordering a new appraisement on good cause shown."

When this section is read in connection with section 659 there can be no doubt as to the intention of Congress to confine the jurisdiction over this and similar causes to the Supreme Court of the District of Columbia, and it is equally plain that the intention of Congress is expressiy stated in the words of the statute quoted.

This court, in District of Columbia *vs.* Cemetery, 5 Appeals, 511, says:

> "In the absence of the statute, as we have stated, we would not have any authority to review such action; and the statute does not, either expressly or by implication, confer any such authority upon us. A writ of error or appeal will lie only when it is authorized either by special or general law (United States *vs.* Nourse, 6 Peters, 470; *Ex parte* Zellner, 9 Wall., 244). It will not lie where there is a special statutory jurisdiction of an unusual character conferred upon the court below, without any provision for an appeal (Hayes *vs.* Fischer, 102 U. S., 121; *Ex parte* Kearney, 7 Wheat., 38; Dourousseau *vs.* United States, 6 Cranch, 307)."

In Chappell *vs.* Edmonson Co., 83 Md., 512, the court says:

> "The statutory provisions investing the circuit court with the powers of reviewing and of confirming or setting aside an inquisition of condemnation, conferred a special and limited jurisdiction, entirely distinct and independent of its common-law powers; and since no appeal was expressly given from its decision in such a case, none lies to any other tribunal."
>
> "The provisions of the general railroad act (Law 1850, c. 140, sec. 18), making final the decision of the Supreme Court, on an appraisal of lands taken for railroad purposes by proceedings *in invitum*, was not abrogated by Laws 1854, c. 70, '*in relation to special proceedings*' authorizing an appeal from '*a final order affecting a substantial right, made in a special proceeding*,' as this relates solely to the ordinary special judicial proceedings under general provisions in relation to practice."

In the matter of the application of the D. & H. Canal Co. to acquire title to lands, 69 N. Y., 209.

"An order of the general term reversing an order confirming an award in condemnation proceedings, and directing a new appraisal, is not reviewable in the Court of Appeals."

Matter of, etc., N. Y. W. S. & B. R. Co., 94 N. Y., 287.

Matter of petition of N. Y. & H. R. R. Co., 98 N. Y., 12.

Wilmington & Susquehanna Co. *vs.* Condon, 8 Gill and Johnson, 443.

Moores *vs.* Bel-Air Water & Light Co., 79 Md., 391.

Hopkins *vs.* P., W. & B. R. Co., 94 Md., 257.

II.

The defendant in error further insists that the motion to dismiss the appeal should have been sustained because the plaintiffs in error failed to pursue the method prescribed by the statute for reviewing the award of the appraisers.

Section 658 of the Revised Statutes of the United States, relating to the District of Columbia, provides as follows:

> "The award of the arbitrators may be reviewed by the court in which such proceedings may be had, on written exceptions filed by either party in the clerk's office within ten days after the filing of such award, and the court shall take such order therein as right and justice may require by ordering a new appraisement on good cause shown."

Section 9 of the act of February 28, 1903, which is the Union Station act, provides that the condemnation of lands for the purposes of the Baltimore and Ohio Railroad Company should be effected in the manner provided by the sections of the Revised Statutes of the

United States relating to the District of Columbia from 618 to 676, both inclusive. The award of the appraisers was filed in the clerk's office of the Supreme Court of the District of Columbia on the 21st day November, 1904. From that time and until the confirmation of the award by Justice Gould, on the 20th day of April, 1905, no written exceptions were ever filed by the plaintiffs in error, and indeed no exceptions were filed by them at any time. This section of the statute prescribes the mode and the only mode in which the award might be reviewed. The machinery provided by the law for reviewing the award has not been followed. The plaintiffs in error had the right to object to the award within ten days after it was filed. Not having done so, they must be held to have waived any objection to the award, either in form or substance.

Again, it is provided in the same section that any appeal under the statute shall effect only the amount of the award.

The appeal attempted to be prosecuted by the plaintiffs in error had no relation to the amount of the award, but sought to compel the defendant in error to take property which it did not need and had not sought to acquire.

III.

As will appear from page 57 of the record, on April 20, 1905, Justice Gould, holding the District Court, confirmed and ratified the award of the appraisers, and on the same day, upon motion of the plaintiffs in error, the respondents in the court below, the sum of $35,392.50 was ordered to be paid to the plaintiffs in error, which payment was accordingly made. Thereafter, on the 27th of April, 1905, the plaintiffs in error noted an appeal from so much of the order of April 20, 1905, confirming the award, as failed to require the defendant in error to

acquire the entire tract of land described in the answer of the respondents, and which permitted the defendant in error to limit its acquisition to the portion of land described in the instrument of appropriation. It is respectfully submitted that the plaintiffs in error can not accept and receive the benefits of a portion of the decree and then appeal from something not in the decree.

> "When a party to a proceeding to assess damages sustained by reason of the construction of a railroad through or over his lands accepted the amount assessed it was held that he was not thereafter entitled to appeal."
>
> Mississippi R. R. Co. *vs.* Byington, 14 Iowa, 572.

> "If the owner accepts damages awarded he can not object to the report either on account of the amount awarded or on any other ground."
>
> Lewis on Eminent Domain, sec. 351, In re Application of Woolsey, 95 N. Y., 13 .

> "After receiving damages parties can not be heard against the validity of the proceedings or appeal from the same, although they may be in fact erroneous."
>
> Mills on Eminent Domain, sec. 329.
> Embury *vs.* Connor, 3 N. Y., 511.
> Town *vs.* Blackberry, 29 Ill., 137.
> Karber *vs.* Nellis, 27 Wis., 215.
> Kile *vs.* Yellowhead, 80 Ill., 208.
> Chatterton *vs.* Parrott, 46 Mich., 432.

It was, of course, competent for the plaintiffs in error to appeal from the entire decree, if an appeal would lie at all, or to appeal from so much of the decree as affected them adversely, but it is respectfully submitted that the order confirming the award of the appraisers is

an entirety and can not be regarded as made up of two distinct parts. The order appealed from is as follows:

> "It appearing to the court that the exceptions heretofore filed by the petitioner to the appraisement and award of damages returned by the appraisers herein having been withdrawn it is thereupon by the court this 20th day of April, A. D. 1905, adjudged, ordered and decreed that the said appraisement and award returned by the appraisers be, and the same is hereby, in all things, ratified and confirmed.
>
> "And it further appearing to the court that the petitioner has paid into the registry of the court the sum of $45,392.50, being the full amount of the appraisement and award returned by the appraisers, it is by the court further adjudged, ordered and decreed that the fee-simple title to the land in the petition and instrument of appropriation particularly described, be, and the same is hereby, vested in the said petitioner, The Baltimore and Ohio Railroad Company, and it is further adjudged, ordered and decreed that the petitioner pay all the costs of this cause down to and including the entry of this decree, to be taxed by the clerk, and including all fees and commission of the clerk on the said sum of $45,392.50, paid into the court as aforesaid by the petitioner."

This decree is distinctly a confirmation of the award and appraisement of the appraisers, and if objectionable to the appellants, now plaintiffs in error, should have been appealed from in its entirety. A party can not elect to accept a substantial benefit from a decree and appeal from any portion of it.

It is contended by the plaintiffs in error that the appeal in this case is not an appeal "from the award nor from any action of the appraisers, nor is it an appeal from any action of the court exercising authority under any of the sections of the Revised Statutes relating to

the District of Columbia," but claim that it is an appeal from the judgment of the court construing certain sections of the acts of February 12, 1901, and February 28, 1903.

A reference to the record will show that this contention is not founded in fact. The only order made by the court is the order of April 20, 1905, confirming the award (Rec., p. 57).

The appellants took no exceptions to the award of the appraisers within the time and in the manner prescribed by statute, and were not in a position before the Supreme Court of the District of Columbia to disturb the award or to have the same reviewed, because they had not followed the procedure defined by the act.

While it is not necessary that an appeal be taken from an entire judgment or order, it is necessary that when an appeal is taken from a part of an order that it be a part raising a distinct and independent question, which may be appealed from separately. In this case no such distinct and independent question is raised. The order itself is to be examined, and the substance of that order is that the appraisement and award of damages be confirmed. It is impossible to separate the award from any other proceedings had in the case, and the only way the award can be reviewed is by following the procedure specified in the act.

The claim of the appellants that their appeal was from the judgment of the court construing certain sections of the acts of February 12, 1901, and February 28, 1903, is an inaccurate statement of the situation.

It is further urged that even if the statutes could be said to create a special statutory proceeding of an unusual character it would not follow that the ordinary right of appeal given in general terms by existing law from all final orders, judgments, and decrees of the court was thereby cut off.

In answer to this contention we submit that the Rock Creek Park case, Shoemaker *vs.* United States, 147 U. S., 282, did not consider or decide in anywise the questions now presented.

In the case at bar the statute provided for a review of the award, and, having so provided, no review outside of the statutory direction can be had.

There is in all of the cases a positive distinction drawn between the jurisdiction of the appellate courts in cases where the statute fails to provide a method of procedure and appeal and in cases where a particular method of procedure and appeal is contained in the statute.

In this case that particular method is provided by statute and does not include, but, on the contrary, clearly excludes, the right of an appeal to the Court of Appeals, particularly in view of the failure of the appellants to save their rights by following the plain provisions of the statute.

It will be observed that the appeal is noted "from so much of the decree of April 20th, 1905, confirming the return and award of the appraisers herein as fails to require the petitioner, The Baltimore and Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation."

There is no such part of the decree, and there could not have been. The decree was not and could not have been broader than the claim of the petition. If, as we shall endeavor to show later on, the respondents had the right to compel the company to take more property than that described in the instrument of appropriation, this right could only be enforced in some other and independent proceeding instituted by the respondents.

The record contains a bill of exceptions (Rec., p. 54),

signed on the 29th day of November, 1904, excepting to the order of the court overruling the objections raised by the respondents in their answer and by counsel for the respondents and to the appointment of the appraisers on various grounds.

These exceptions, it would seem, have been abandoned, and from the notice of appeal heretofore referred to the appellants limit their appeal to a part of the decree which, in fact, does not exist.

POINTS AND ARGUMENT ON THE MERITS OF THE CASE.

FIRST. THERE IS NO ACT OF THE CONGRESS REQUIRING IN ABSOLUTE TERMS BRENTWOOD ROAD TO BE CLOSED, BUT ONLY A PROVISIONAL REQUIREMENT THAT THE ROAD BE CLOSED IN THE EVENT THAT THE BALTIMORE AND OHIO RAILROAD COMPANY ACQUIRE, BY PURCHASE OR CONDEMNATION, THE LANDS ABUTTING THEREON, INCLUDING IN THIS CAUSE THE 90 ACRES OF LAND OWNED BY PLAINTIFFS IN ERROR.

SECTIONS 1, 2, 3, ACT FEBRUARY 12, 1901 (31 STAT., 775); SECTION 5, ACT FEBRUARY 28, 1903 (32 STAT., 912–913).

SECOND. THERE IS NO AUTHORITY CONFERRED BY THE SPECIAL ACTS OF CONGRESS HERETOFORE CITED AND GOVERNING THIS MATTER, UNDER WHICH THE RAILROAD COMPANY, DEFENDANT IN ERROR, COULD ACQUIRE, BY CONDEMNATION OR OTHERWISE, THE 90 ACRES, OR ANY PORTION THEREOF, GREATER THAN THE ¾ OF AN ACRE CONDEMNED, FOR THIS RESIDUE OF 89 ACRES IS ABSOLUTELY UNNEEDED AND UNNECESSARY TO THE RAILROAD

IN COMPLYING WITH THE REQUIREMENTS OF THESE STATUTES AND IN THE PROPER PERFORMANCE OF ITS CORPORATE FUNCTIONS AND ITS DUTY TO THE PUBLIC.

THIRD. EVEN IF THE STATUTE WAS MANDATORY IN REQUIRING THE BRENTWOOD ROAD TO BE CLOSED, THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA ARE THE ONLY AUTHORITY OR PERSONS WHO CAN ENFORCE THIS PROVISION OF THE LAW, AND PLAINTIFFS IN ERROR ARE BARRED AND ESTOPPED IN THIS PROCEEDING FROM RAISING ANY QUESTION AS TO THE ROAD REMAINING OPEN OR OBJECTING WITH REGARD TO ITS NOT BEING CLOSED, FOR THEY VOLUNTARILY ACCEPTED THE APPRAISED VALUE OF THE PORTION OF THIS TRACT CONDEMNED BY DEFENDANTS IN ERROR, WITH FULL NOTICE AND KNOWLEDGE THAT A PORTION OF THE LAND SO CONDEMNED WAS TO BE USED FOR THE FIXED PURPOSE OF STRAIGHTENING AND WIDENING THIS ROAD AND KEEPING IT PERMANENTLY OPEN FOR PUBLIC USE. PLAINTIFFS IN ERROR CAN NOT COMPLAIN THAT THIS ROAD IS KEPT OPEN, AND AS LONG AS IT IS NOT CLOSED THERE IS NO LEGAL GROUND UPON WHICH THEY CAN BASE A CONTENTION AND DEMAND THAT THE DEFENDANTS IN ERROR BE COMPELLED TO ACQUIRE THE 89 ACRES UNCONDEMNED.

Should the court, passing the question of the right of appeal, enter upon a consideration of the merits of this case, it is submitted that the decree of the court below is entirely in accordance with the provisions of the statute creating the right in the defendant in error and defining the manner in which that right should be exercised.

The respondents', now plaintiffs in error, notice of appeal in the Supreme Court of the District of Columbia is in the following words:

> "Come now the respondents herein and note an appeal to the Court of Appeals of the District of Columbia from so much of the decree of April 20, 1905, confirming the return and award of the appraisers herein as fails to require the petitioner, the Baltimore and Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation."

This notice of appeal seems to be two-fold in character. It first refers to something that nowhere appears in any decree or order entered in this cause. The appeal is from the failure of the court to require the petitioner to acquire the entire tract of land described by plaintiffs in error in their answer as respondents. Then it gives notice of appeal from that portion of the decree which permitted the Railroad Company to limit its acquisition to the portion of the land described in its petition or instrument of appropriation.

With regard to the second and final paragraph of the notice of appeal, we respectfully direct the attention of the court to the fact that on the motion of the respondents below the sum of $35,392.50, the amount of the appraised value of the land named in the instrument of appropriation, was paid over to and accepted by them. Voluntarily they accepted this appraised value, and nowhere except to that portion of the decree or judgment which conveyed the title to this property to the Railroad Company. They acquiesce in the acquisition by the company of this portion of the land by voluntarily accepting the price placed upon same by the appraisers

and by failing to appeal from that portion of the decree of the court conveying the title. Yet they insist with vigor that this Brentwood Road, now occupying a portion of the very land for which they accepted payment, must be closed. If correct in this claim, by whom must this be done? Whose duty is it, under the law, to close the road? Under section 5 of the act of February 28, 1903, heretofore cited, this duty devolves on the Commissioners of the District of Columbia, it providing:

> "The Commissioners of the District of Columbia are hereby authorized and directed to cause all streets, avenues, ways and alleys to be closed, as provided in this act, and in accordance with the intent thereof."

But the same act and the same section further directs that:

> "No streets or avenues shall be closed or abandoned under the provisions of this act or of the acts relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Railroad Company, approved February 12, 1901, until *all* of the property abutting on the streets or avenues or portions thereof provided to be closed in this act shall have been acquired by said Railroad Company or companies, or the Terminal Company referred to herein, either by condemnation or purchase as hereinafter provided."

Section 1 of the Act of 1901, making the same provision, adds these words:

> "It being the intent hereof that no property owner shall be deprived of egress from or ingress to his property."

The Brentwood Road can not be closed by the Commissioners because the Railroad Company has not acquired all the abutting property. The plaintiffs in error can not complain that the road is not closed because it

remains open for the reason that they accepted voluntarily the money paid by defendant in error for the strip of ground to be used for the partial purpose of keeping the road open, and this acceptance with full notice of the purpose for which the land condemned was to be used. With this knowledge they come into court and move that this fund be paid over to them, and do not except to or appeal from the judgment of the court transferring the title to the land to be used for this purpose to the Railroad Company. The road is open; it can not be closed by the Commissioners under the law; it remains open by the tacit approval of the plaintiffs in error through this acceptance of the amount of the award for the value of the property condemned, and what basis in law, equity or morals have they for their insistence that the Railroad Company must acquire the ninety acres of land abutting on this open road, and other avenues?

Referring to the appropriate sections of the acts of Congress, approved February 12, 1901, and February 28, 1903, to wit, sections 1, 2, and 3 of the first act, and section 7 of the second act, and section 5 of the third act, we find the Congress declaring specifically and distinctly that no portion of any street shall be closed under the authority of any of these acts until the Railroad Company shall have secured control of all the property abutting upon said portion to be closed, it being the intent that no property owner should be deprived of egress from or ingress to his property. The Congress, with eminent propriety, determined that no property owner in the city of Washington or in the District of Columbia should be denied egress from or ingress to his property, and therefore no portion of any street, avenue, or alley could be closed until the Railroad Company had secured the property abutting upon both sides of the street. This is the declared intent of the law. This is the

express language of the statutes. How do the plaintiffs in error stand with regard to this intent? Brentwood Road, so far as it bounds their property, is not closed for one inch of its distance. It can not be closed under the acts of Congress referred to, because the Railroad Company is not the owner of land lying south or east of the road. Further, a study of the map styled Exhibit B, No. 1570, filed with the amended answer of the respondents (Rec., p. 10), shows the absurdity of the claim that under the language of these statutes the whole of this ninety-acre tract must be acquired should the Brentwood Road itself be closed. The plaintiffs in error own the tract of land shown on this map containing ninety acres, and being bounded on the north by New York avenue extended, on the east and south by the lands of the Columbian Institute for the Deaf and Dumb, and Florida avenue, on the west by the Brentwood Road, extending northwardly from Florida avenue to Fourth street. This road passing from Fourth street northwardly does not touch the property owned by the plaintiffs in error. From the point where Fourth street and New York avenue meet, the road passes over property owned by the Baltimore and Ohio Railroad Company alone, property heretofore purchased from plaintiffs in error. The road, so far as it affects the Patterson tract, does not bound more than one-fifth of its north and west frontage, and very little more than one-third of its total area.

Even if plaintiffs in error were correct in their contention that under the language of these acts Brentwood Road must be closed, that this is mandatory, and that the Railroad Company must acquire that portion of their tract which abuts on the road, the largest portion of the total tract which could possibly come within the broadest construction of the language, would be the southwest portion of the tract bounded by Florida Avenue, extending from Sixth Street westwardly to Delaware

Avenue at Brentwood Road; thence from Florida Avenue at Delaware Avenue to New York Avenue and Fourth Street; thence with a line drawn parallel with Florida Avenue from Fourth Street to the lands of the Columbian Institute; thence southwardly from that point to the point of beginning on Florida Avenue. This would be the only portion of the tract that could possibly be held to abut on Brentwood Road. Even so far as this portion is concerned, it does not fall within the intent or the language of the acts for the reason that it has a frontage its entire length on Florida Avenue, an open, traveled street of the city. The fifty or sixty acres of the Patterson tract east of the line extending parallel with Florida Avenue from Fourth Street back to the lands of the Columbian Institute, receive no more benefit from Brentwood Road than they do from the road running from Joppa to Jerusalem.

The cases of Gilfillan against McKee, 159 U. S., 303, and Reynes *vs.* Dumont, 130 U. S., 354, relied on heretofore by the plaintiffs in error to sustain their right of appeal herein, will doubtless again be cited in this court. It is respectfully submitted that in no way do these decisions support the contention of the plaintiffs in error.

In the first case, Gilfillan against McKee, there were two distinct and separate funds, one termed the special and one the general fund, in both of which McPherson claimed an interest. The court below directed that McPherson be paid a certain amount from the special fund, but denied him any interest in the general fund. He accepted the amount awarded to him from the special fund and appealed as against the denial of his right to participate in the general fund.

This court, page 311, says:

> "It did, undoubtedly, appear from the certificate of the clerk above mentioned that McPherson was paid $7,070 of the amount decreed to him

> out of the special fund, but it further appeared that he claimed to be paid from the general fund of $147,057.63, and that his claim in that particular was denied. While the acceptance of the whole or a part of a particular amount awarded to a defendant might, perhaps, operate to estop him from insisting upon an appeal, there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson, and the other applicable to the general fund, in which McPherson had been denied any participation whatsoever. Clearly his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund. There is nothing inconsistent in his action in accepting the amount awarded to him and appealing from the refusal of the court to award him the general fund."

The answer filed by the respondents, now plaintiffs in error (Rec., pp. 6, 7, 8, 9, 10) shows two contentions on their part:

First. That defendant in error had no legal right to acquire by condemnation the triangular piece of land described in its petition.

Secondly. That defendant in error was not authorized under the law to acquire any lesser portion of the lands of plaintiffs in error abutting on the Brentwood Road than the whole of said land.

Quoting from the answer referred to (Rec., p. 7) we find this language:

> "Further answering said rule, these respondents say that they are advised and believe, and therefore aver, that the Baltimore and Ohio Railroad Company is not authorized by the acts of Congress in the said instrument of appropriation referred

to, nor by any other legislation, to acquire by condemnation the land in the said instrument of appropriation referred to, and they deny the right of the said Baltimore and Ohio Railroad to acquire the same by condemnation, and deny the power and jurisdiction of this court to adjudicate any condemnation thereof."

(Rec., p. 8): "Further answering these respondents say they are advised and believe, and, therefore, charge that the Baltimore and Ohio Railroad company is not authorized under the law to acquire any lesser portion of the land of these respondents abutting on the Brentwood Road than the whole of said land, as prescribed in the said acts of Congress, and that the attempt of the said Railroad Company, by its instrument of appropriation herein, to select for condemnation an arbitrary part of said tract is unauthorized, null and void."

The contention then was distinctly that the railroad company could condemn no less than the entire tract of 90 acres. Less than three-quarters of an acre was condemned, the price thereof fixed by appraisers, the uses therefore declared in the petition of the Railroad Company and the plaintiffs in error accepted the sum awarded.

If plaintiffs in error desired to appeal, they should have declined to accept the amount awarded, excepted to the action of the court in transferring the title to this triangular piece of land to the Railroad Company, and stood on their rights to insist upon a condemnation of the entire tract—no more and no less.

With regard to the case of Reynes *vs.* Dumont, there seems to be no analogy whatever between the matters adjudicated therein and the case at bar. There two parties were claiming a lien upon certain securities. The lower court adjudged one as entitled to have the securities applied to the payment of his debt. There was a

surplus remaining, and this was awarded to the other claimant. There was no question about his right to the overplus. He accepted that sum and then appealed as against the judgment, so far as it held the lien of his opponent superior to his own.

The court said:

> "We are asked to dispose of the case adversely to appellants upon the ground that they received the remaining bonds and money after the liens decreed in Frey's favor were satisfied; but such receipt does not oust jurisdiction. The acceptance by appellants of what was confessedly theirs, can not be construed into an admission that the decree they seek to dissolve was not erroneous, nor does it take from appellees anything on the reversal of the decree to which they would otherwise be entitled."

The facts are so widely different from this case that in our judgment it can not be cited as an authority either convincing or even persuasive herein.

The Baltimore and Ohio Railroad had acquired for its freight and right of way purposes the property in Eckington needed, which property was north of Florida avenue and west of Brentwood Road. It had acquired also on the east of Brentwood Road and north of New York avenue property needed for its right of way, this property having been bought from the Patterson estate. It needed the triangle first described in the instrument of appropriation at the intersection of Brentwood Road and Florida avenue on the east side of Brentwood Road, and having endeavored to purchase it at a fair market value and being unable to do so, it filed said instrument of appropriation. It being difficult, if not impossible, to carry Brentwood Road over or under Florida avenue, as it was then located, it purchased the additional 50 feet east of said triangle, also described on plat after page 4

of the record, in order to straighten Brentwood Road, and to avoid the necessity for closing the same. This relocation was under sections 646 and 647 of the Revised Statutes of the District of Columbia.

The provisions of the two acts referred to requiring the purchase or condemnation of property abutting upon streets or parts of streets to be closed have application, we contend, to streets and avenues within the city of Washington and not to county roads, and in its application to said property it was to the lots abutting on said streets and not to squares, and if by any interpretation it is extended to county roads it would not mean that every farm through which a county road passed was to be purchased or could be condemned in order to close said road.

The Patterson farm fronts on Florida avenue for several hundred feet and on New York avenue, when extended, for several thousand feet, and by reason of the relocation of the end of Brentwood Road, near Florida avenue, its front on Brentwood Road south of New York avenue is left entirely undisturbed.

The position of the plaintiffs in error is distinctly peculiar. They plead in their answer (Rec., pp. 7-8), and have maintained throughout the progress of this cause, that Brentwood Road, under the mandatory language of the acts of 1901 and 1903, heretofore cited, must be closed and abandoned as a public highway. But these same statutes are equally mandatory in their declaration that this road can not be closed until the Railroad Company acquires all abutting property. This the company has not done, nor indeed can it do so under condemnation proceedings, for it could not truthfully allege in its petition, nor could it prove by human testimony, that the 90-acre Patterson tract of land in controversy was necessary to enable it to carry out and into effect the purposes and provisions of the acts of Congress referred

to. Without such allegations in the pleading, and without the necessary proof to support them, no court would order the condemnation of this tract of land and the transfer of its title from the plaintiffs in error to the defendant in error.

The Railroad Company has not acquired this land and can not acquire it, and until it so does Brentwood Road can not be closed, and yet the plaintiffs in error insist that the acquisition must be had and the road closed.

It is a novel, a curious, and, perhaps, heretofore unknown status when an owner tries to force and compel a railroad, by condemnation proceedings, to take over his property unneeded for the uses and purposes of the railroad.

The whole history of legislation committing to railroads the right to condemn the property of individual owners shows a distinctly-declared purpose on the part of legislative bodies to limit these holdings under condemnation to what is absolutely necessary for the railroads manifest needs in serving the public and performing its corporate duties. That any law will ever be enacted requiring or permitting a railroad corporation to acquire within the District of Columbia or elsewhere a tract of farming land, absolutely unneeded for the purposes of its creation, beggars belief.

If defendant in error, requiring and needing only three-quarters of an acre of this 90-acre tract to comply with Congressional legislation on this subject, should have attempted to condemn the entire farm, would not the court, under the law and testimony, have limited the taking to the small fraction needed?

A careful consideration of these several provisions of the three acts will, it seems to us, effectually dispose of the contention of the plaintiffs in error, and will show conclusively the correctness of the decree of the court below.

The court will bear in mind the fact which has heretofore been pointed out—that the appellants have accepted the award of damages for the property included in this triangle and in the 50-foot tract for the relocation of Brentwood Road; that the same award gave to the appellants $10,000 for damages to the adjacent property, which $10,000 was paid into the registry of the court, was not accepted, but was, by an order of the court, obtained at the instance of the plaintiffs in error, invested to await the termination of this suit.

If, however, the plaintiffs in error, by virtue of the several sections referred to, had some further claim for damages to this property, or had the right to prevent the relocation of Brentwood Road and the continuance of that road from New York to Florida avenues as an open roadway, or had the right to compel the purchase of more property than was taken by the company under the proceedings in this cause, or had even the right to compel the taking of the entire Patterson tract, as herein described, could that right be insisted upon in the proceedings brought by the company to acquire a piece of ground sufficient for its statutory needs and requirements?

The road comes into court and shows that only the triangle described is needed for the occupation authorized by these statutes. It may be that the appellants have many rights in several directions relating to other and adjacent property. May they by answer in a condemnation proceeding bring those rights into this controversy?

The court below refused to consider the questions so attempted to be raised by the respondents in their answer, and proceeded, according to the prayer of the instrument of appropriation, to appoint appraisers to assess damages for the land described in said instrument of appropriation and damages for adjacent land. The

plaintiffs in error accepted the award of the appraisers so far as damages to land actually taken were involved; they filed no exception to the award of the appraisers and took no appeal therefrom. The limited appeal attempted by them from the final order of the court confirming the award has been heretofore called to the attention of this court, and under that very limited appeal, which is, in fact, not from what the decree contains, but from what the appellants think it should have contained, it is sought to raise here the questions that were attempted to be raised below in the answer, and which affect the merit of the proceedings and not the award, and the award only is, by statute, the subject of review.

In construing the provision of section 1 of the act of February 12, 1901, herein referred to, which is that no portion of any street shall be closed under authority of this act until said Railroad Company shall have secured control of the property abutting upon said portion to be closed, it being the intent hereof that no property-owner shall be deprived of egress from or ingress to his property, it is suggested—

1st. That this provision has reference only to the streets and avenues of the city and has no application to country roads.

2d. That the closing of the street is not absolutely fixed or made mandatory upon the company, but is left to the option of the company to be closed when the company acquires the abutting property, and if the abutting property is not required, then the streets, or parts of streets, to remain open.

3d. That the plain intention of Congress was to prevent house or lot owners from being cut off from access to their property, and that Congress can scarcely be seriously charged with intending in this section to permit

or compel the company, for the purposes of closing a street, or if the act applies to country roads, to purchase adjoining farms.

If a farm of ninety acres could be so taken, either voluntarily or under compulsion, by the company, then a farm of a thousand acres or of ten thousand acres might be taken if it abutted even a few feet upon a road.

While not apparently included in the saving clause of the appellants' note of appeal, the question of right in the company to acquire land for the relocation of Brentwood Road near Florida avenue was denied both in the answer and argument of the respondents in the court below. Their contention was that as the act of February 28, 1903, section 9, provided—

> "that such condemnation shall be effected in the manner and by the methods and processes provided by sections six hundred and forty-eight to six hundred and sixty-three, both inclusive, of the Revised Statutes relating to the District of Columbia"

the companies derived no right of authority under sections 646 and 647 of said Revised Statutes. By reference, however, to section 10 of the act of February 12, 1901, the court will observe the following provision:

> "That if for the purpose of constructing and owning the terminals, viaducts, railroads, depots, stations, and other works authorized by this act, or any part thereof, the Baltimore and Ohio Railroad Company shall deem it expedient or advisable that a terminal company in its interest be created and organized in the District of Columbia, the said Baltimore and Ohio Railroad Company, or some person thereto authorized on its behalf by resolution of its president and directors, together with other persons not less than seven in number, of whom a majority shall be residents of

> the District of Columbia, shall cause a certificate of incorporation to be executed and recorded in accordance with the provisions of the general incorporation act of Congress for the District of Columbia relating to railroad companies, being sections six hundred and eighteen to six hundred and seventy-six, both inclusive, of the Revised Statutes relating to the District of Columbia, with such capital stock, not to exceed five million dollars fully paid up, and under such corporate name as may be set forth in such certificate. The corporation so formed shall be vested with all the authority, rights, and privileges granted by said general act, but the Baltimore and Ohio Railroad Company, or such persons as it may designate by resolution of its president and directors, shall be entitled to subscribe for and hold all the stock of said corporations, without advertisement or allotment, as provided in said sections six hundred and twenty-one and six hundred and twenty-two of said Revised Statutes."

And by reference to section 8 of the act of February 28, 1903, it will be seen that "except as modified by this act all the provisions of said act relating to the Baltimore and Ohio Railroad Company, approved February 12, 1901, shall be and remain in full force and effect."

Section 9 of the act of 1903, above quoted, provides the manner and form in which condemnations by the terminal company, the Philadelphia, Baltimore, and Washington Railroad Company, or the Baltimore and Ohio Railroad Company, or by one of said companies acting for all, shall be conducted, but the power, right, and authority is contained in section 10 of the act of 1901. If the court will refer to section 11 of the act of 1901, it will see that the same provisions that are enumerated in section 9 of the act of 1903 are included, and surely it will not be contended that if the condemnation

had proceeded under the act of 1901 the companies could have been deprived of the rights and authority contained in sections 646 and 647.

With Brentwood Road kept open and made straight from New York to Florida avenue, with Florida avenue relieved of grade crossings, and with the intended extension and opening of New York avenue, it is difficult to see where the plaintiffs in error are injuriously affected by reason of the taking of the land included in the description of the instrument of appropriation filed in this cause.

In fact, it would seem that their condition has been improved by the company's action. In the relocation of Brentwood Road they have obtained a straight instead of a crooked road. Florida avenue is carried under the company's tracks, and is thereby relieved from grade crossings, and, accordingly, ingress to and egress from the property of the plaintiffs in error is improved, and at the same time they have obtained for the ground actually taken a price satisfactory even to themselves.

It is respectfully submitted that the decree of the court below should be affirmed.

GEORGE E. HAMILTON,
Attorney for Defendant in Error.

M. J. COLBERT,
JOHN W. YERKES,
JOHN J. HAMILTON,
Of Counsel.

WINSLOW *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 59. Argued December 9, 10, 1907.—Decided January 6, 1908.

The objection, taken by a property owner in a condemnation proceeding for a part of his property, that, under the statute, his entire property must be condemned, is waived and cannot be maintained on appeal, if he accepts the award made by the commissioners in the condemnation proceeding and paid in by the condemnors for the parcel actually condemned. After an award has been made and accepted the proceeding is *functus officio*.

28 App. D. C. 126, affirmed.

THE facts are stated in the opinion.

Mr. William G. Johnson for plaintiffs in error:

The acceptance of the fund allowed for the land actually taken is not inconsistent with the claims of the obligation of the company also to acquire and pay for the residue.

The proceedings are informal and no form of pleadings are provided. See §§ 648, 663, Rev. Stats., relating to District of

[1] For opinion of the court on motion for rehearing and modification of the decree, see *post*, p. 609.

Columbia. The objection was distinctly made in the answer to the claimed right of the company to acquire a part only of the land, and its obligation to acquire all was also insisted upon. The award was in distinct parts; a specific sum, $35,392.50, for the land taken, and $10,000 for damages to the residue, and the plaintiffs in error only accepted the former sum, the $10,000 remaining in the registry of the court, and the order of the court directing payment recognized this segregation of the fund and treated the part of the fund directed to be paid as "the amount of the appraised value of the land."

Mr. George E. Hamilton and *Mr. John W. Yerkes*, with whom *Mr. Michael J. Colbert* and *Mr. John J. Hamilton* were on the brief, for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error to the Court of Appeals of the District of Columbia. The case under review is a proceeding for the condemnation of land needed for the approach to the Union Station in Washington. The plaintiffs in error were the owners of a lot of unimproved land containing ninety acres. It was of irregular shape and one of its shorter boundary lines was a public highway called Brentwood road. The construction of a union station and the approaches to it of all the steam railroads entering Washington was provided for by two acts of Congress approved February 12, 1901, 31 Stat. 774, and an act approved February 28, 1903, 32 Stat. 912.

Section 3 of the first of the two acts of 1901, 31 Stat. 775, directed that certain streets should be "completely vacated and abandoned by the public and closed to public use." Among them was Brentwood road between S street and Florida avenue. The part of Brentwood road which bounded the plaintiffs in error's land was included in the part thus directed to be closed. Section 5 of the act of 1903, 32 Stat. 912, "vacated, abandoned and closed" certain other streets, including a further portion of Brentwood road, and enacted that "no streets or avenues shall

be closed or abandoned under the provisions of this act or of the acts relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, until all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said acts, shall have been acquired by said railroad company or companies or the terminal company referred to herein, either by condemnation or purchase."

In 1904 the defendant in error filed an "Instrument of Appropriation," in which it sought to condemn about six-tenths of an acre of the land of the plaintiffs in error, to carry out the purposes of the act of 1903. This land was a small part of the land of the plaintiffs in error which abutted on Brentwood road, and part of it was desired, according to the allegation of the Instrument of Appropriation, "to be used for relocating and changing" a part of Brentwood road which had been closed by the act of Congress. The plaintiffs in error filed an answer, alleging in substance that the railroad company was without power to condemn part of their land abutting on Brentwood road, but must, in obedience to the act of Congress, condemn the whole, and that the company had no authority to lay out streets or reopen or relocate a street which Congress had directed to be closed, and therefore could not condemn land for that purpose. The answer concluded by asking a dismissal of the proceeding. The objections raised by the answer were heard by a justice of the Supreme Court of the District and, on October 18, 1904, overrruled by him. To this ruling there was an exception duly taken. There were thus raised upon the record two questions, in the decision of which, it is earnestly and forcibly argued by counsel, there was error. The two questions are: first, whether the statute, under the provisions of which the condemnation proceedings were had, required the taking of all the land in a single ownership, which abutted on a street closed by the act, irrespective of its shape or extent; and, second, whether the railroad company had any authority to change or relocate a street declared by the act of Congress

to be closed and abandoned. We do not think it necessary to decide either of these questions for reasons which will now be stated.

After the ruling just stated three persons were appointed by the court to appraise the damages sustained by the plaintiffs in error by the condemnation proposed. They, having heard the parties, reported that the value of the six-tenths of an acre taken was $35,392.50 and the damage to the remaining part of the lot was $10,000.00. On April 20, 1905, the court confirmed the award. On the same day the railroad company, having paid the sum awarded into court, the court, on motion of the plaintiffs in error, directed the payment to them of the sum fixed as the value of the land taken. After having asked and accepted the payment of this sum of money, the plaintiffs in error noted an appeal to the Court of Appeals "from so much of the decree confirming the return and award of the appraisers as fails to require the petitioner, the Baltimore and Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation."

If the company was without right to take a part of the land of the plaintiffs in error, unless it took more or all, or if the purpose for which the land was sought to be taken was unlawful, the proper course would be to dismiss the petition. This is what the plaintiffs in error originally asked. But by accepting the sum awarded for the land actually taken, they have lost the right to insist that the petition was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled; nor do they now wish or seek to do this. They wish to have the condemnation stand and to receive its fruits. What they seek to accomplish appears clearly in the notice of appeal. It is to compel the railroad to acquire the remaining eighty-nine acres of their land. What the plaintiffs in error wish is stated in other words

in the closing sentence of their brief, where it is said that the case ought to be remanded to the Supreme Court of the District with instructions "there to proceed to the condemnation of the remainder of the land." It is therefore obvious that the plaintiffs in error abide by the logical consequences of their request for and acceptance of the sum found to be the value of the land taken and waive and abandon the objections to the maintenance of the petition, which they originally interposed. We think that the position which they now occupy, in place of that which they have abandoned, is untenable. This proceeding has been allowed to reach its end. The condemnation which the petition sought to have made has been made. The land described in the petition has been appraised, the compensation to be paid has been deposited with the court and received by the owners. We do not regard the failure to ask and receive the $10,000.00 as important. The title to the land has vested in the railroad company. The objections to the maintenance of the petition have been waived. The counsel for the plaintiffs in error asks that the case be remanded to the Supreme Court of the District with instructions to proceed to the condemnation of the remainder of the land. But he does not disclose how in this proceeding that can be done. This proceeding is *functus officio*. Everything which it asked has been done. The defendant in error is satisfied and will not amend the petition. The court is without power to compel its amendment, and certainly cannot of its own motion file a new petition in the name and behalf of the railroad company. Even if we were of the opinion that the railroad company had taken less land than the statute required to be taken, or had taken land for unlawful uses, it would be useless now to express the opinion and idle to remand this case, which by the act of the plaintiffs in error has been put in such a position that our opinion could not be made effective.

These were in substance the views of the court below, and its

Judgment is affirmed.